84-783

No. _____

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Paul C. Murray,

Petitioner,

v.

Theodore M. Gardner, Special Agent,
Federal Bureau of Investigation, *et al,*

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

A. DID THE CIRCUIT COURT ERR IN RULING THAT SPEECH OF A FEDERAL EMPLOYEE MADE AT A MEETING AT WHICH ALL EMPLOYEES WERE IN ATTENDANCE, AND WHICH SPEECH WAS AT THE REQUEST OF THE MANAGEMENT OF THE OFFICE, WAS NOT ENTITLED TO FIRST AMENDMENT PROTECTIONS?

B. DID THE CIRCUIT COURT ERR IN RULING THAT THE PETITIONER STATED NO DUE PROCESS VIOLATION IN HIS COMPLAINT WHEN IT ALLEGED THAT THE APPELLEES DID NOT FOLLOW AGENCY REGULATIONS AND POLICY TO WHICH THE PETITIONER EMPLOYEE WAS ENTITLED?

PARTIES TO THE PROCEEDINGS

1. Paul C. Murray, a Special Agent of the Federal Bureau of Investigation for more than a decade, is the Plaintiff-Appellant below and Petitioner herein.

2. Theodore M. Gardner, Oliver B. Revell, Barry Laken, James W. Vatter, John Schreiber, and Ivan Ford are co-employees of the Federal Bureau of Investigation, who hold management positions with the Agency, and are the Co-Defendant-Appellees below and Co-Respondents herein.

3. Federal Bureau of Investigation is an Agency of the Federal Government and was the Defendant-Appellees below and is the Respondent herein.

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IN THE

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OCTOBER TERM 1984

Paul C. Murray,

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Theodore M. Gardner, Special Agent,
Federal Bureau of Investigation, *et al,*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Paul C. Murray petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals denying the Petitioner's appeal from the United States District Court for the District of Columbia was entered on August 14, 1984. *Murray v. Gardner, et al,* No. 83-1750, slip op. (D.C. Cir. August 14, 1984). This Opinion is reprinted at page A-1 of the Appendix to this Petition.

The District Court Order entered June 13, 1983, dismissed Petitioner's First Amendment claim which was his second cause of action in his complaint. This Order appears at page A-15 of the Appendix.

The District Court had previously dismissed the Petitioner's first, third, fourth and fifth causes of action in the complaint; *i.e.*, claims based on due process, defamation, conspiracy, and intentional infliction of emotional distress by Order entered March 21, 1983. The District Court's Order appears at page A-16 of the Appendix to this Petition.

JURISDICTION

The Order of the United States Court of Appeals for the District of Columbia Circuit was entered August 14, 1984, affirming the lower Court's dismissal of Petitioner's complaint. A timely Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit is hereby submitted to this Court and jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS

The First and Fifth Amendments of the United States Constitution are set out in the Appendix at A-17.

The pertinent statutes and regulations which govern the procedure for disciplining employees of the Federal Bureau of Investigation (hereinafter referred to as FBI) are set out in the Appendix at A-21.

STATEMENT OF THE CASE

This Petition arises from the dismissal of Paul Murray's lawsuit against his superiors at the Washington Field Office (hereinafter referred to as WFO) of the Federal Bureau of Investigation (hereinafter referred to as FBI) and the agency itself.

The Petitioner, Paul C. Murray, is a former Navy pilot and has been an employee of the FBI for more than a decade. Prior to the incident on which this action is based, he was recognized by the FBI as an excellent or superior employee. Petitioner's complaint alleges violations of his First and Fifth Amendment Constitutional Rights and his common law rights. Jurisdiction was founded upon the existence of Federal question and pendent jurisdiction. The violation of these Amendment rights occurred when retaliatory disciplinary action was taken against Murray for certain statements he made at an all-employees meeting of the WFO of the FBI. The Due Process violations occurred during the disciplinary process.

The complaint was filed on August 25, 1982. On December, 1982, the Respondents filed a motion to dismiss or in the alternative for summary judgment.

The Petitioner filed a motion in opposition to Respondents' motion to dismiss. After oral argument on March 16, 1983, the Court on March 21st dismissed the first, third, fourth, and fifth causes of action on the complaint, *i.e.*, claims based on the due process, defamation, conspiracy, and intentional infliction of emotional distress.

On April 21, 1983, the Petitioner moved for a default judgment due to lack of responsive pleading by Respondents; this motion was denied by the Court on April 28, 1983, and the Court gave the Respondents until April 26, 1983, to file a responsive pleading. On April 26, 1983, the Respondents filed a new motion to dismiss and the Petitioner filed a memorandum in opposition.

On May 11th, the Petitioner moved to amend the complaint as a matter of right or alternatively with leave of Court, and also moved to compel responsive pleadings. Both motions were denied by the Court. The Petitioner also moved on May 11, 1983, to vacate the Order dismissing the first cause of action (due process). This was denied without argument despite Petitioner's request for oral argument.

Further, on May 11th, 1983, the Petitioner filed Notices to take depositions of the Respondents, Vatter, Gardner, Schreiber, and Laken, on June 2nd and 3rd, 1983. On May 27, 1983, the Respondent moved for a protective Order to quash the Notice of depositions, which Notice was granted on June 1, 1983, without opportunity for Petitioner's counsel to argue.

On June 13, 1983, the Court heard argument by counsel on the renewed motion to dismiss the First Amendment claim. The Court took the matter under advisement and filed an Order dismissing the remainder of the complaint (the First Amendment claim) that same afternoon.

Petitioner appealed from the District Court's ruling on September 12, 1983. In an Opinion authored by Senior Judge MacKinnon, the Court of Appeals affirmed the trial Court's dismissal of Petitioner's claim on August 14, 1984. From that adverse ruling, Petitioner timely files for review by this Court.

FACTUAL BACKGROUND

Since the lawsuit was dismissed on the grounds of failure to state a claim, the allegations of the complaint must be taken as true to determine if a recognized claim for relief was alleged. Accordingly, the following summarizes these allegations.

In November, 1981, Petitioner Murray learned of a contingent plan to furlough roughly one-third of the agents in the WFO of the FBI. The plan called for the selection of agents to be furloughed by drawing agent's names from a hat. Petitioner's name had been drawn from the lottery pool. The names of management were excluded from the furlough plan. No other field office used this "lottery" method.

Murray was also informed that there would be a meeting of all WFO enployees (approximately seven hundred) called for the specific purpose of discussing the pros and cons of the "lottery" method. During this meeting, employees were encouraged by management to express their views regarding the proposed furlough. Prior to the meeting, Murray was warned by Repondent, Barry Laken, that expression of his oppsition to the contingency plan could be detrimental to his job status.

During the all-employees meeting, Murray expressed his opposition to the plan and also stated he resented the threats that had been made to keep him quiet. Following the meeting, Respondent, Gardner, ordered Murray to report to Respondent's, Schreiber's, office. Murray's request to be accompanied by a witness to this meeting was denied.

During the meeting in Schreiber's office, Murray refused to change his opinion about the furlough plan and he was ordered to file a report on the alleged efforts to keep him quite.

Murray filed his memorandum regarding coercion by Laken as requested, but was told that his memorandum was unacceptable, unprofessional, bordered on insubordination, and that he was the subject of an administrative inquiry.

An "investigation" was conducted and Murray was notified by letter from Respondent, Oliver Revell, dated January 20, 1983,

that Murray was being considered for suspension without pay for thirty days and was being placed on probation.

In the same letter, Murray was notified that he had several rights including a review by an Executive Assistant Director of the FBI, a written opinion of the Executive Assistant Director of the FBI, and a right to counsel. Murray was later denied these rights during the proceedings and, in fact, when he tried to involve his attorney to the proceedings he was further disciplined.

Eventually, Murray was suspended for fourteen days rather than the proposed thirty days. He was given twice the normal probation period. The fourteen day disciplinary suspension period is the maximum number of days that Murray could have received without entitling him to an appeal to the Merit System Protection Board since a suspension of fourteen days or less is not termed an "adverse action." Murray's attempts to obtain an appeal of the decision to the Director of the FBI, pursuant to FBI regulations, were denied.

All of the actions taken against Petitioner by his superiors were in retaliation for his opposition to the lottery furlough plan which he voiced at the all-employees meeting.

FEDERAI QUESTIONS RAISED

Petitioner seeks review of issues involving the First and Fifth Amendments of the Constitution of the United States which were timely raised below and decided adversely to the Petitioner. The First Amendment and this Court's prior decisions protect employee's speech which addresses matters of public concern. Furthermore, speech which relates *only* to personal interests is afforded First Amendment Protection under "most unusual circumstances." *Connick v. Myers*, 103 S. Ct. 1684 (1983). The District of Columbia Court of Appeals ruled as a matter of law that Peitioner's opposition opinions voiced during the employee conference called to hear such opinions were not protected by the First Amendment. This Court is presented with a unique opportunity to consider and clarify the important question of whether the First Amendment protects the employee from his employer's retaliation when the employee voices his opposition

on issues made public during an open forum set up by his employer.

The Court also has an opportunity to rule on whether the Fifth Amendment affords a Federal employee due process protection in a case which involves a fourteen day suspension without salary. This question was specifically reserved by this Court for decision at a later date in *Bush v. Lucas*, 76 L.Ed.2d 648, 662 n.28 (1983).

REASONS FOR GRANTING THE WRIT

A.

THE CIRCUIT COURT ERRED IN RULING THAT SPEECH OF A FEDERAL EMPLOYEE MADE DURING A MEETING AT WHICH SPEECH ALL EMPLOYEES WERE IN ATTENDANCE, AND WHICH WAS AT THE REQUEST OF THE MANAGEMENT OF THE OFFICE, WAS NOT ENTITLED TO FIRST AMENDMENT PROTECTIONS.

1. Employee's Comments At The All-Employee Meeting Relate To Matters Of Public Concern; Therefore, The Lower Court Should Be Reversed.

Last year in *Connick v. Myers*, 103 S. Ct. 1684 (1983), this Court defined the parameters of protected speech within the government work place. In *Connick*, an assistant district attorney had been fined after she objected to her transfer and distributed a questionnaire to fifteen of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. After she was fired, she filed suit under 42 U.S.C. § 1983 contending that her employment was wrongfully terminated because she exercised a Constitutionally protected right of free speech.

The Court rejected her claim and held that:

> ...when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee

> upon matters only of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency allegedly in reaction to the employee's behavior. 103 S. Ct. at 1689-1690 (footnote omitted).

The Appellate Court in the instant case ruled that the comments Petitioner made at the all-employees assembly to contain nothing, "...that would enrich the public's store of appropriate knoweldge on the operation of the FBI or which would in any way relate to matters of general public concern" and, therefore, did not constitute protected speech. We disagree on the grounds that: a) the disposition of public funds is a public issue; b) the quality of the Federal work force is a public issue; and c) threats made to stifle valid dissent are a matter of public concern.

a. *Disposition of Public Funds is a Public Issue.* The furlough "lottery" on which Petitioner commented is clearly a matter of public concern. It is beyond dispute that expenditure of public funds is a legitimate concern and that employees cannot be disciplined for expression of views on this issue. *Pickering v. Board of Education*, 391 U.S. 563 (1968). This Court can take judicial notice that at Congressional appropriation and authorization hearings not only do agency personnel testify but also representatives of public interest groups and private citizens. Obviously, such decisions affect the disposition of public monies. Petitioner's speech directly relates to the appropriate use of limited public funds. In the case at hand the furlough was mandated as a result of the lapse of Federal funding. Due to the funding problem, the Bureau was in the position of having to decide how best to use the remaining available funds. Headquarters determined that a furlough of employees was appropriate and regional offices were instructed to implement such a furlough. The WFO management elected to draw names from a hat (management was excluded from the lottery pool) to determine who would be furloughed. Management then called an all-employees meeting to be held November 25, 1982, at which approximately 700 or more employees attended. The purpose of

the meeting was to explain the furlough system and obtain feedback regarding it.

Any furlough system is by its very nature a decision as to how public funds are spent since it results in certain individuals and their capabilities being paid and retained on the work force, and other individuals not being paid and, therefore, not performing work for the FBI. Furlough decisions are decisions as to the most appropriate way of spending a budget developed through tax dollars. Just as the speech in *Harlow v. Fitzgerald,* 102 S. Ct. 2727 2727 (1982) constitutes public speech so was the speech of Paul Murray directed toward the most appropriate way to spend public money.

b. *Quality of the Federal Work Force is a Public Issue.*

Just as Petitioner's comments realte to decisions on spending of public monies, so it relates also to the quality of personnel to be maintained on the FBI staff. Certainly the public has an interest in maintaining a quality Federal work force, particularly in an agency which performs the crucial law enforcement function of the FBI. Just as decisions regarding what individuals should be hired into an agency will affect the quality of the performance of that agency, so do decisions regarding what personnel will be *removed* from the work force. As Murray told the all-employees meeting, a furlough plan should consider seniority as a factor. This makes imminent sense because, as a general rule, more senior personnel are more experienced, hence, more valuable to an agency's operations. Surely the Appellees cannot contend that the quality of the Federal work force is not a matter in which the public has a valid interest or concern, nor is there any rationality to an argument that favoring seniority over a lottery system is potentially unbecoming of supervisory authority as in *Connick, supra.* To punish this invited speech with a fourteen day suspension without pay is to send a message that: "If you want to get along, you must go along." A quality work force cannot be maintained by the stifling of dissent. The strong inference from the facts alleged in the complaint is that Petitioner's superiors wanted to flush out the biggest dissenter, in front of the whole work force, trick this dissenter into speaking up under the guise of "invited speech" at an all-employees conference, and then make an example of the him by harshly disciplining him.

The employers might contend that since the speech occurred inside the place of employment, it should not be protected. This argument cannot stand. Just as it was not necessary for the comments in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), to be broadcast outside the work place in order to be deserving of protection, neither is it necesary for Murray's comments to Laken at the all-employees meeting to be spread beyond the work place. In *Givhan, supra*, the comments of the employee were considered protected because they related to allegedly discriminatory practices. The Court held that it was not necessary for these comments to be broadcast publicly and that private communication (in that case, a one-on-one conversation) was protected as well. *Givhan, supra*, at 415. In the present case, the complaint clearly states that Murray's comments were made at a meeting of all WFO employees, called at the request of management, so that employees could voice their views on the lottery furlough.

There is another issue related to the quality of the Federal work force in this case. The defendants perforce msut argue that the Director of an agency should be entitled to call an all-employee conference, ask for opinions on certain matters, and then be permitted to discipline any employee who states views which do not meet with the approval of the agency head by citing a pretense such as poor job performance. If this sad situation were ever to fully develop in the United States, the public would be deprived of a competent and efficient government and would be given instead a government operated by "yes" men. It cannot reasonably be argued that the public has no interest in employees frankly responding to a supervisor's request for comments.

c. *Threats Made to Stifle Valid Dissent is a Matter of Public Concern.* Another matter of public concern contained in Petitioner's speech is intimidation of Federal employees. In this case, the management of the WFO called a meeting of employees

to express views regarding the appropriate selection of agency personnel and the spending of public monies, clearly areas of public concern. Prior to the meeting, Petitioner was told that expressions of his personal views could be detrimental to his career. In other words, an attempt was made to intimidate him and, in fact, the threats were made good.

Incident to the Respondents' attempts to suppress the speech of Murray is the issue of quality and efficency of government operations. It is not in the public interest for employees to be told prior to meetings at which views will be solicited that certain views can be expressed only at risk of hurting the declarant's career. If the Respondents' argument is accepted, group meetings of employees held to ascertain workers' viewpoints will be a sham and the public will be deprived of the benefit that occurs to all organizations when there is a spirit of teamwork, cooperation, and participation, rather than one of threats, tyranny, and vendetta.

This is not a case like *Connick, supra,* where an employee, on her own initiative and without the consent or prior knowledge of management, circulated a questionnaire among fifteen of her coworkers. Here, *management instigated and invited public criticism* of their proposed furlough plan during a meeting attended by the entire seven hundred or more WFO employees. Management's purpose, while perhaps noble and democratic, was distorted by a few of its rank who tried to bully Petitioner into silence before the public hearing. After the hearing, the Respondents again attempted to silence Murray. Only when they were unsuccessful in convincing Murray to change his voiced opinions did they proceed to "investigate" him, place him publicly on probation, and eventually suspend him without pay.

The Petitioner's situation is akin to that in *McGee v. South Pemiscot School District,* 712 F.2d 39 (8th Cir. 1983). In *McGee,* a dispute arose as to whether a local school should have a track team. This controversy was publicizied in the local newspapers by the school board. The plaintiff, McGee, wrote a letter to the editor of a newspaper about the issue and, consequentially, was eventually discharged. The Eighth Circuit noted:

> This case stands on an entirely different footing from *Connick v. Myers*, ...We have before us a case where the plaintiff wrote a letter to a newspaper about *an issue that had already been publicly aired by the defendants*. *Id.* at 342, - 43 n. 4. (Emphasis added.)

While, in this case, Petitioner's speech was not broadcast publicly in the newspaper, petitioner's expression was *requested* by field office management after management first aired the issue. The school board in *McGee, supra,* only impliedly invited the teacher's comments. In our case, management *explicitly* invited Petitioner's comments; the foremost distinguishing feature between this case and *Connick, supra.*

2. Even If This Speech Is Determined Not To Be "Public Speech" It Should Be Protected Under The First Amendment Because It Fits The "Unusual Circumstances" Test of *Connick v. Myers.*

It is very rare indeed that the law and the facts of a case mesh perfectly so that the rule is clear to all. While Murray's comments must be protected speech because under the circumstances his opinions touched on "matters of public concern" as opposed to being upon "matters *only* of personal interest," (emphasis added) this case may best be decided as one of those "most unusual circumstances" which this Court included as an exception to trigger First Amendment protection. *Connick, supra,* states that a Federal Court may review agency action in "most unusual circimstance," even though speech is not directed at a public issue. Most unusual circumstances are present in this case. WFO management called the all-employees meeting so that employees might express their views on the lottery system (or to give the illusion that empoyees could express their views). When Petitioner spoke at the meeting, he addressed the topic for which the meeting was called. The Federal government, as an employer, should not be heard to say that it is interested in promoting a system whereby managers can ask employees for their opinions relating to an agency policy, and thereafter pretextually discipline the employee for that opinion. Implicit in the invitation to speak is the assurance that a price or penalty will not be extracted on account of what is said.

The principle stated here is not new, that is, that there are circumstances under which speech may be accorded First Amendment protections even though normally no such protection exists. This Court has stated that a public forum may be created for limited purposes or discussion of certain subjects. *Perry Education Association v. Perry Local Educators' Assn.*, 103 S. Ct. 948, 955 n.7 (1983). Restrictions on speech are permissible as long as they are not merely an effort to oppose the speaker's view. *Id.* at 955. Speech of an individual directed toward the purpose of the limited forum is protected by the First Amendment. *United States v. Albertini*, 710 F.2d 1410, 1416 (9th Cir. 1983).

In the case at bar, the management of the WFO created a forum specifically for the expression of views on a particular subject, a "lottery" form of furlough plan. They now argue that use of the forum is not a protected activity and that there should be no legal remedy when management retaliates against an employee who accepts management's invitation to speak. This retaliation, moreover, was in the form of the *maximum* discipline possible without the invocation of any employee administrative appeal rights, an action that is calculated to send the message that, "We are fair because you can speak your mind, but if we don't like what you say, we'll punish you."

Finally, this Court should rule that WFO management is estopped from asserting that these actions can be taken against Murray with impunity since the views of Murray were made at the request of WFO management. This is not a case such as *Connick, supra,* in which the employee was indeed initiating a palace revolt. Murray was merely responsing to Respondents' offer to speak at a meeting.

Accordingly, this Court must find either that Murray's speech was directed to a matter of public concern, or that "most unusual circumstances" existed; and, therefore, reverse that judgment of the Circuit Court.

B.

THE CIRCUIT COURT COMMITTED LEGAL ERROR IN RULING THAT THE PETITIONER STATED NO DUE PROCESS VIOLATION IN HIS COMPLAINT WHEN IT ALLEGED THAT THE RESPONDENTS DID NOT FOLLOW AGENCY REGULATIONS AND POLICY TO WHICH THE PETITIONER EMPLOYEE WAS ENTITLED.

The Court of Appeals affirmed the District Court's dismissal of the Fifth Amendment Due Process claim of the Petitioner, holding that Petitioner received sufficient process. He was not accorded all required process however, so the lower Court's ruling should be reversed.

This Court has clearly stated that under the Due Process clause of the Federal Constitution an individual is entitled to all of the procedural protections contained in agency regulations and orders even when such procedure affords an individual greater protections than would have existed without such regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539-540 (1959). *See also Mazaleski v. Treusdell*, 562 F.2d 701, 717-718 n.38, 183 U.S. App. D.C. 182 (D.C. Cir. 1977). This broad language has been interpreted by this Court to apply not only to decisions regarding employees, but also to circumstances which would affect an individual's eligibility for the benefits of Federal program. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The government conceded below the correctness of the proposition in *Hollingsworth v. Harris*, 608 F.2d 1026, 1027 (5th Cir. 1979). In *Morton* it was held that denial of benefits to an individual could not be sustained because the basis for denial was not published in the agency's manual, contrary to agency policy. The Court wrote:

> The Bureau of Indian Affairs (BIA), by its Manual, has declared that all directives that "inform the public of privileges and benefits available" and of "eligibility requirements" are among those to be published . . . [I]t [The Bureau of Indian Affairs] must comply, at a minimum, with its own internal procedures.

Morton, supra, at 235.

Under 5 U.S.C. § 7503 (b) (3), an employee against whom a suspension for fourteen days or less is proposed is entitled to be represented by an attorney. In a letter dated January 20, 1982, Respondent, Revell, an FBI supervisor, promised that several procedural protections would be provided Murray, including the right to the use of an attorney in all future proceedings. As stated in the complaint, the Respondents denied Petitioner his right to an attorney on three occasions despite his request that his attorney be permitted to be present.

A catalog of the statutory and agency protections, along with those rights promised Petitioner by the Respondents' letter dated January 20, 1982, are as follows:

a. Right to a review of the entire matter by an Executive Assistant Director of the FBI;

b. Right to respond to all charges;

c. Right to the use of an attorney in all future proceedings;

d. Right to a written decision from an Executive Assistant Director of the FBI shortly after thirty days from the date of the letter (January 20, 1982);

e. Right to a copy of all supporting documents; and,

f. Right to an appeal to the Merits System Protection Board if the suspension went into effect.

Of these guarantees, Murray was denied review of the matter by an Executive Assitant Director of the FBI; denied a written decision from an Executive Assistant Director of the FBI thirty days from the date of the January 20th letter; and denied a letter and appeal to the Merits Systems Protection Board. Furthermore, the Director of the FBI denied Murray's request for appeal.

Murray was denied the opportunity to present the matter to the Merit System Protection Board since the employer reduced his punishment so that he would not be eligible to present his case to a fair fact-finder.

This Court recently observed that, in personnel actions involving suspensions for fourteen days or less, there is no provision for redressing improper action by supervisors. *Bush v. Lucas*, 76 L.Ed.2d 648, 662 n.28 (1983). In *Bush* it was held that an individual who received full administrative proceedings could not then sue for relief in Federal court. The concurring opinion pointedly noted that injuries not protected by the Federal statutory scheme available on *Bush* can still be pursued under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29L.Ed.2d 619, 91 S. Ct. 1999 (1971). *Id.* at 665 (Marshall, J., Blackmun, J., concurring).

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957). The allegations in Petitioner's complaint, as set forth in the Factual Background, allege that the agency did not follow its own requirements, during the disciplinary action against Petitioner and that, therefore, his due process rights were violated. The lower Court did not acknowledge the validity of *Vitarelli, supra, and Morton, supra*, and instead cited *Mathews v. Eldridge*, 424 U.S. 319 (1976), for the proposition that "due process requirements vary according to the severity of the threatened loss." The *Mathews* case, however, deals with the requirements and balancing test by which the constitutional adequacy of an agency's procedures is considered. *Mathews, supra*, in no way decides or even suggests that an agency may ignore its own procedural requirements. The Petitioner's pay has been taken. His career has been blackened. Certainly a hearing before some agency is in order. Even under the *Mathews* standard, a fourteen day suspension and loss of pay hardly seem much less severe than the fifteen day suspension and pay loss necessary to trigger administrative appeal rights.

Perhaps the clearest error by the Circuit Court is its faulty reading of the due process protections provided in Title 5 of the Code. The Court cities several sections of Title 5 and writes that "Murray's suspension is not governed by the subchapter he

cites." *Murray v. Gardner, et al.* No. 83-1750, slip op. at 13 (D.C. Cir. August 14, 1984). Unfortunately, the court overlooked § 7503 of Title 5 which permits, *inter alia,* an attorney to represent the Petitioner in a fourteen day suspension case.

For these reasons, the Circuit Court erred in affirming the lower Court's dismissal of the due process claim and the judgment must be reversed.

CONCLUSION

This petition should be granted because the issue fundamentally affects the rights of thousands and of Federal employees to voice their opinions when invited to do so by their superiors without fear of reprisal by their superiors when the opinion voiced is disfavored. It is important that First Amendment protection be accorded this speech, since otherwise the public cannot expect "in house" criticism or suggestions on important matters will receive a hearing. Especially when the criticism expressed has been invited by management, the circumstance of retaliation is sufficiently "unusual" to fit that exception in *Connick, supra.* Fundamental fair dealing to Federal employees, and protection against "mind control" is at stake.

This case also presents squarely the due process issue reserved by the Court in *Bush, supra,* at footnote 28, and the concurring opinion by justices Marshall and Blackburn; that is, the right of an employee to sue in the absence of a Federal agency remedy for grievances. On the one hand the government argues that the Plaintiff has no agency right to any process including agency hearings and right to counsel. And on the other hand, the government's position is that the employee likewise has no remedy in Court. If the government prevails, there is no remedy whatsoever when supervisors decide to suspend without pay for fourteen days. Approximately two thousand dollars can be taken from Paul Murray's pocket and his career damaged, yet he can make no protest that anyone will hear. The result is that whenever supervisors want to arbitrarily discipline an employee

whose mind is not in conformance with a party line, so long as the suspension is fourteen days or less, their actions will be unchallenged. Here, Petitioner's supervisors must have clearly had this result in mind when they threatened a thirty day suspension, but cut it to the fourteen day maximum that is unreviewable. This is a government of laws and not men. This Court should not contenance such arbitrary Kafkaesque action. The Court should find that the complaint states course of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Petition for Certiorari has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

John D. Bates, Esquire
U.S. District Courthouse
Room 2820
3rd & Constitution Avenue, N.W.
Washington, D.C. 20001

By_____
Counsel

84-783 (3)
No. _____

Office - Supreme Court, U.S.
FILED
NOV 10 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Paul C. Murray,

Petitioner,

v.

Theodore M. Gardner, Special Agent,
Federal Bureau of Investigation, *et al,*

Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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53 pgs

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1750

PAUL C. MURRAY, APPELLANT

v.

THEODORE M. GARDNER, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION, et al.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 82-02405)

Argued March 26, 1984

Decided August 14, 1984

Gilbert Kenneth Davis, with whom *Kevin P. Donovan* was on the brief, for appellant.

John D. Bates, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys, were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: GINSBURG, Circuit Judge, MACKINNON, *Senior Circuit Judge*, and PARKER*, *District Judge for the District of Columbia.*

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: This case presents questions concerning the First Amendment rights of public employees. Similar questions have recently been resolved by the Supreme Court. The facts of this case are clearly covered by these Supreme Court precedents and thus we affirm the District Court's dismissal of appellant's claims.

I.

Appellant Paul Murray, plaintiff below, is a special agent in the Federal Bureau of Investigation. Murray sued six of his fellow agents who were his superiors in the Bureau's Washington Field Office ("Field Office") for alleged violations of his First and Fifth Amendment rights, and for defamation, intentional infliction of mental distress, and conspiracy. He also sought injunctive relief.

In November of 1981, the FBI was forced to develop a plan to furlough approximately one-third of the agents in the Field Office due to funding delays:

> The [Field Office] management had decided to meet this one-third furlough requirement by creating a lottery pool. Individuals who were in the pool would be furloughed if the individuals' name[s] were drawn out of a hat which contained the names of all people in the lottery pool. Management personnel and their secretaries were not a part of the pool. No considerations of seniority, veteran status, or performance appraisals were used in determining who would be a part of the pool. The [Field Office] was the only FBI office to use this furlough method. [Murray's super-

---

* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

> visor] informed Murray that his name had been pulled out of the hat and that he was to be placed on furlough.

Joint Appendix at 6 (hereinafter "J.A.").

At the time of the announcement of the plan, Murray was involved in a custody battle for his children, and he believed that even a temporary lay-off would damage his case for custody. Murray contacted the Principal Legal Advisor of the Field Office, Defendant Barry Laken, to explain his objections to the plan. The following day Murray attempted to carry these objections up the ladder by talking to the Special Agent in Charge ("SAC") of the Field Office, Defendant Theodore Gardner, and Gardner's assistant, Defendant John Schreiber. Both Gardner and Schreiber put Murray off, stating "that he would have his opportunity to speak at an 'all employees conference' which was to be held on November 25, 1981." *Id.* at 7.

The events critical to Murray's First Amendment claim occurred following the aborted attempt to meet with Gardner and Schreiber:

> 15. Later that day the Plaintiff was approached by the Defendant Laken. Laken explained to Murray how a furlough system could result in the furloughing of an individual with a lengthy service record while a person with lesser time on the job might retain his position. These and other statements of the Defendant Laken were intended to give an impression that opposition to the furlough plan could be detrimental to a person's career status.
>
> 16. On November 25, 1981, at the all employees conference, Defendant Gardner explained the furlough lottery and opened the floor to questions and comments. When the Plaintiff Murray took the floor to give his observations, he stated that the furlough lottery was arbitrary and capricious, and that consideration of factors such as veteran status and

> length of time on the job would have provided a more reasonable standard. He stated that the Bureau had "dropped the ball" by failing to plan ahead and have a furlough plan. He also stated that he found it appalling that the best method the FBI could develop regarding furlough was to throw the careers and lives of their employees, and their employees' families into a hat. Murray also stated that he objected to efforts that were made to keep him silent in regards to his views. The Defendant Gardner asked Murray how he felt he had been coerced into silence. Murray responded by stating that he had been approached by Principal Legal Advisor Laken who informed him how an individual with Murray's tenure could be replaced based on sub-standard job performance. Gardner then ordered Murray to report to the Defendant ASAC Schreiber's office after the conference.

Id. at 8-9. Murray's charge of coercion, on its face a very serious accusation, set in motion a chain of events which would eventually lead to disciplinary action against Murray. The complaint alleges that SAC Gardner demanded that Murray make formal charges against Laken. *Id.* at 9. "Gardner stated that he . . . needed a memo to start an official investigation into charges that Laken coerced Murray. Murray and Gardner agreed that the memo could be submitted by close of business of November 30, 1981." *Id.* Murray turned in a "rough draft" on November 30. The draft was wholly unsatisfactory to his supervisors. Though Murray's complaint lacks specificity at this point, it appears that Murray failed to adequately state his allegations concerning coercion and, in his supervisors' view, explain his charges that the furlough system was arbitrary and capricious. Nor did Murray even include his name in the memo. *Id.* Defendant Schreiber wrote to Murray detailing the dissatisfaction with the memo, stating that Murray's conduct was "unacceptable, unprofessional and bordering on insubordination." *Id.* at 9-10. "Schreiber verbally advised Murray that he was

the subject of an administrative inquiry." *Id.* at 10. The confrontation grew worse:

> 22. In compliance with the Schreiber letter of 12/1/81, Paul Murray wrote a detailed letter concerning the allegations of coercion and the arbitrary and capricious nature of the proposed furlough. Murray retrieved his "unacceptable" rough draft from Schreiber. He was not asked to return the rough draft which he had recovered to aid him in reworking his memorandum, but that evening after he had turned in his final memorandum, Schreiber accused him of insubordination for not returning the rough draft.

Id. at 10. Two days later Murray was "confined to perform work in the office rather than his normal duties." *Id.*

> [Murray's supervisor] also told Murray that Vatter [another assistant to Gardner] was referring Murray for discipline to the Office of Professional Responsibility within the Bureau because Murray would not cooperate. On December 11, 1981, Murray was interviewed by Ivan Ford, an FBI agnet [sic] assigned to the Office of Professional Responsibility, who informed him only that they had heard there were some problems at [the Field Office] over the lottery. Murray was asked to tell the agents all about the events surrounding the all employees conference. He was not told by the special agent that he was being investigated, although as the interview progressed, it became apparent that Murray was a target.

Id. at 11. Defendant Oliver Revell, Assistant Director of the FBI, wrote Murray on January 20, 1982, informing him that consideration was being given to a number of disciplinary actions which might be taken against Murray. The same letter also notified Murray of a number of procedural protections due him given the kind of discipline contemplated:

> (1) review of the entire matter by an executive assistant director of the FBI; (2) the right to respond to all charges; (3) use of an attorney in all future proceedings; (4) a written decision from an executive assistant director of the FBI shortly after thirty days from the date of the January 20 letter; (5) a copy of all supporting documents used by the Bureau in pursuit of the action; (6) appeal to the Merit Systems Protection Board if the proposed [30 day] suspension should go into effect.

Id. at 12. Murray responded to this letter on January 28, 1982. No action was taken against Murray until March 11, 1982:

> 37. On March 11, 1982, Paul Murray received a letter of that date from Oliver Revell. At no time between the date of the initial Revell letter and this one had Murray's retained attorney been contacted by the FBI regarding the charges, and all efforts by Murray to involve his attorney in such meetings with his supervisors had been rebuffed by the supervisors.
>
> 38. In the March 11, 1982 letter, Revell notified Murray that he was suspended without pay for fourteen (14) days and that he was on probation for six months. In that letter Murray was told, although this was never mentioned to him previously as part of the investigation, that the situation was caused by personal problems that Murray was having with his son. The letter continued: "these problems were accentuated by your fear, however misguided, of being furloughed and how this would affect your current attempt to gain custody of your son." . . .
>
> 39. In the March 11, 1982 letter Revell also states that Murray's counter-allegations in his January 28 letter were reviewed in depth and proven to be without substance, yet Revell offered not one shred of evidence that demonstrates that the counter-allegations are without substance. . . .
>
> 40. The March 11 Revell letter continues by saying that it is the FBI's duty to protect long term

> employees from episodic abhorrent conduct caused by an employee's personal problems. Revell then wrote that Murray was suspended without pay for fourteen days and placed on probation for six months. He also stated that Murray's personnel matter would be referred to a personnel officer who would decide whether Murray should be transferred.
>
> 41. The March 11, 1982 letter deprived Paul Murray of his right to an appeal before the Merit Systems Protection Board, since under Federal Bureau [of] Investigation regulations a suspension for fourteen days or less was not an adverse decision. Further, efforts by Paul Murray to obtain an appeal by the Office of the Director of the FBI were denied.

Id. at 15-16. This statement of the facts is wholly drawn from Murray's complaint. As the District Court granted defendants' motion for summary judgment, we must view the facts in the light most favorable to Murray. *See National Souvenir Center, Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 512 (D.C. Cir. 1984).[1]

II.

A. *The First Amendment Complaint.*

Murray argued in the District Court that "[t]he actions by all of the Defendants to this suit were part of an effort to deprive the Plaintiff of his Constitutional Right to Freedom of Speech under the First Amendment; both to penalize him for previous lawful expression, and to deter him from making future lawful expression." *Id.* at 18. The focus of this portion of Murray's suit is his speech to the assembled personnel of the Field Office on November 25, 1981. Murray argues that these remarks

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[1] Murray has moved the court to either strike the twenty-one page appendix of record materials filed as a supplement to appellees' brief or to strike the entirety of the Brief and Appendix for Appellees. We deny the motion. The costs of reproducing these 21 pages, however, shall not be assessed against Murray. Fed.R.App.P. 39.

constituted protected speech. He asserts that since his comments were directed to the furlough plan, they were "clearly a matter of public concern" because the furlough plan involved the disposition of public funds and the quality of the federal work force. He further argues that the alleged attempt to coerce him to silence on the matter is itself a matter of public concern.

All parties agree that the Supreme Court's recent ruling in *Connick v. Myers*, —— U.S. ——, 103 S. Ct. 1684, 51 U.S.L.W. 4436 (1983), is central to the disposition of this case. In *Connick* an assistant district attorney had been fired after she objected to her transfer and followed up her objections by circulating a questionnaire that telegraphed her dissatisfaction with the office management. When she was fired she cited the questionnaire as an alleged exercise of her First Amendment rights which, she stated, were being interfered with. The Court rejected her claim, writing:

> [I]f Myer's [sic] questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. . . .
>
> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a

> federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

103 S.Ct. at 1689-1690 (footnote omitted). The Court recognized that the crucial determination in cases such as this one would be "[w]hether an employee's speech addresses a matter of public concern," an inquiry to be "determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* Thus every case depends upon careful scrutiny of the facts surrounding the employee's declaration. The Ninth Circuit has written a concise summary of the *Connick* test:

> Speech by public employees may be characterized as not of "public concern" when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies. . . . On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of first amendment protection.

McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983). In other words, the role of the whistle-blower merits protection; the expressions of personal dissatisfaction by a discontended employee do not.

We imagine that at times this line would be difficult to draw, as the part of a "good government" partisan is no doubt very attractive as the last refuge of the incompetent or discontended. But no such difficulty is present here. We discern nothing in Murray's remarks that would enrich the public's store of appropriate knowledge on the operation of the FBI or which would in any way relate to matters of general public concern. Rather, his remarks appear to be an example of the quintessential employee beef: management has acted incompetently. Perhaps it did—the furlough plan seems less than

Solomonic. But the furlough plan was purely a labor relations matter, an arrangement of employees under which some would win and some would lose. Its connection to the matters of public concern *Connick* envisioned does not even qualify as remote. If *Connick*'s rule could be bypassed by the arguments that Murray raises—that public monies and government efficiency are involved—*Connick* would stand for nothing. We refuse to eviscerate so recent a holding.

Murray recognized the difficulty inherent in his attempt to distinguish *Connick* and thus included in his arguments the position that *Connick* allows for an exception to its rule. He cites the Court's statement that when an "employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, *absent the most unusual circumstances*, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." *Connick, supra*, 103 S.Ct. at 1690 (emphasis added). The Supreme Court offered no clue as to what might constitute the "most unusual circumstances" sufficient to trigger this exception. Murray relies upon his choice of forum: an all employees meeting called by the employers. We do not regard such a conference as out of the ordinary, much less "most unusual." Murray asserts that the "federal government, as an employer, should not be heard to say that it is interested in promoting a system whereby managers can ask employees for their opinions relating to an agency policy, and thereafter pretextually discipline the employee for that opinion." Brief for Murray at 23. But Murray's own account leaves no doubt that the all employees' meeting was conceived as a legitimate attempt by those in charge at the Field Office to bring employee reactions to the furlough plan to the attention of the management. The events which followed cannot fairly be described as a deliberate coaxing-out of dissent for the purpose of initiating reprisals against the dissenters. Murray's comments con-

tained a very serious accusation of coercion leveled at Laken. It was this accusation which set in motion the further meetings which eventually resulted in Murray's discipline. We refuse to label this series of events as "most unusual circumstances" sufficient to displace Murray's grievance from the category of "individual personnel disputes and grievances." *McKinley, supra,* 705 F.2d at 1114.[2]

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[2] While my colleagues would not reach the issue I consider to be applicable, I feel compelled to note that defendants raise a significant question of their immunity from causes of action such as this one. Defendants pressed this argument before the District Court, but the District Court rejected it in cursory fashion, stating: "There is . . . genuine dispute over whether defendants' actions violated clearly established constitutional rights." J.A. at 28. The Supreme Court, however, in 1982 noted "that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald,* 457 U.S. 800, 817-818 (1982). The Court established that government officials

> generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person might have known.

Harlow, 457 U.S. at 818. The principle announced in *Harlow* was just forcefully reaffirmed, and applied by the current term of the Supreme Court to establish the immunity of state officials from a suit, brought under section 1983, in which a plaintiff claimed unlawful dismissal from his public employment. *See Davis v. Scherer,* —— U.S. ——, 52 U.S.L.W. 4956, 4958 (June 28, 1984).

Under the *Harlow* standard for official immunity, if "the law was not clearly established at the time the contested conduct occurred, the inquiry ceases." *Zweibon v. Mitchell,* 720 F.2d 162, 168 (D.C. Cir. 1983). "Our task after *Harlow,* therefore, is to measure [the defendants'] conduct by reference to clearly established law at the time [this conduct] occurred." *Id.* Similarly, "if the trial judge determines that the law was not clearly established at the time the conduct occurred, the in-

B. *The Fifth Amendment Claim.*

Murray asserts a Fifth Amendment claim which alleges that he was denied procedural protections guaranteed him by statute and FBI regulations. The district court dismissed this claim, stating:

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quiry ceases and the official is entitled to summary judgment." *Hobson v. Wilson*, No. 82-2160, slip op. at 42-43 (D.C. Cir. June 8, 1984).

This examination of an immunity claim, whether by the trial court or on appeal, is never an easy task, but it cannot be shuffled off. While *Connick*'s standards had not been made explicit at the time of Murray's discipline, that case's review of the law which controlled in 1981 leaves no doubt in my mind that these defendants enjoyed immunity at the time of their actions regarding Murray. The case law leading up to *Connick* had not approached a declaration of the kind of protection which Murray now claims. *See Pickering v. Board of Education*, 391 U.S. 563 (1968), *Perry v. Sindermann*, 408 U.S. 593 (1972), *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). *Connick* makes clear that public employees had never enjoyed the ability to "constitutionalize [every] employee grievance." *Connick*, 103 S.Ct. at 1694. It was manifestly *not* established in 1981 that complaints about a furlough plan equaled comment on a matter of public concern and was thus protected under the First Amendment. I would refuse to saddle these defendants with responsibility for knowledge of a standard that had never been established and which was, in fact, explicitly rejected only two years after the events occurred. The essence of qualified immunity is the necessity of protecting government officials from charges that they knowingly violated standards that were in fact unknowable. "A public official should not be made to guess, at his peril, whether distinctions as rarefied as those appellants proffer might one day subject him to personal liability for his official acts." *Zweibon*, 720 F.2d at 170. Government officials must be granted the ability to pass unmolested through bogs of murky legal precedent. They must not become prey to every hypothesis of what the law might have come to forbid had it eventually developed along certain lines. When the law is clear, and an official's duties delineated, then he will not be able to rely on the immunity defense. But we must not and

> [E]ven if Murray does have such property and liberty interests, he was given all the process that was due under the circumstances. Due process requirements vary according to the severity of the threatened loss. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). In Murray's case, the major disciplinary action taken against him was a fourteen-day suspension without pay. Prior to that suspension he was notified of the proposed disciplinary action and given the opportunity to respond orally and in writing to accusations on which the action was based. Such notice and opportunity to be heard was sufficient to satisfy due process requirements under the circumstances. *See, e.g., id., Foster v. Ripley*, 645 F.2d [1142, 1150 (D.C. Cir. 1981)].

J.A. at 29. We agree.

Murray relies in part on procedural guarantees allegedly owed him under 5 U.S.C. §§ 7511(a)(1)(B), 7512(2), 7513(b), and the FBI's regulations. J.A. at 46-58. We note initially that Murray's suspension is not governed by the subchapter he cites. *See* 5 U.S.C. § 7512(2) ("This subchapter applies to . . . (2) a suspension for more than 14 days . . . ."). Murray complains that he was denied an appeal to the Merit Systems Protection Board ("MSPB"), but the MSPB is barred by statute from hearing cases involving such limited suspensions. *Id.* He also complains that he was denied a right to counsel, but the regulation he points to specifically provides that "[*i*]*f* allegations are possibly criminal in nature, the employee has the right to seek counsel in

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do not demand that every government official become skilled in guessing the future path of the law. It is uniquely the responsibility of the trial court to carefully consider the defense of immunity when it is offered, else it will be no more than a rhetorical bandage, useless in preventing harm to public servants. It is true that we can and do decide this case on a different basis, but it is no less a responsibility to point out past errors of the District Court to the end that they not be repeated again.

the same vein as any other individual." J.A. at 47. The actions for which Murray was disciplined were not criminal in nature. As for the allegations that he was denied notice of an impending disciplinary action, Murray's complaint admits that he was given this notice on December 1, 1981. J.A. at 9-10. Murray asserts more plausibly that procedural protections promised him were not delivered. *See supra* at 5-6. But we cannot say that the notice and opportunity to respond accorded him fell short of the governing laws and regulations.

C. *The Conspiracy Claim.*

Murray complains that, because his conspiracy claim implicated the Constitution, the District Court improperly dismissed that cause of action. Our discussion above reveals that no constitutional violation occurred, so this issue need not be addressed.

D. *The District Court's Denial of Murray's Motion to Amend His Complaint.*

This too is an inconsequential issue. We have reviewed the proposed amendments. J.A. at 33-34. Had they been allowed, they would not have affected the outcome of the case.

E. *Conclusion.*

The Supreme Court has taken a position that the First Amendment shall not be pressed into service as an alternative means of resolving employee grievances. Appellant Murray attempts to skirt the Court's instruction. We, however, cannot. The decision by the District Court is affirmed.

Judgment accordingly.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL C. MURRAY

Plaintiff,

v.

THEODORE M. GARDNER, et al.,

Defendants.

ORDER

Upon consideration of defendants' motion to dismiss, plaintiff's opposition, the memoranda filed by the parties, oral arguments of counsel, and the entire record, the Court finds that the recent decision by the United States Supreme Court in *Connick v. Myers*, No. 81-1251 (decided April 20, 1983), mandates that plaintiff's First Amendment Cause of Action be dismissed. In a previous Memorandum and Order in plaintiff's case, dated March 21, 1983, the Court noted that Murray's statements for which he claims First Amendment protection were "not directed to a matter of true public concern." Memorandum at p. 4. The Supreme Court in *Connick* stated that if a government employee's statements "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [the federal courts] to scrutinize the reason" for disciplining the employee. Slip op. at 7-8. Under the ruling in *Connick*, therefore, plaintiff does not have a valid claim under the First Amendment. Accordingly, it is by the Court this 13th day of June 1983

ORDERED that defendants' motion to dismiss is granted and the Second Cause of Action contained in plaintiff's complaint, based on the First Amendment, which is the sole remaining claim in this action, is dismissed with prejudice as to all defendants.

/s/ signature

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL C. MURRAY,

Plaintiff,

v.

THEODORE M. GARDNER, *et al.,*

Defendants.

ORDER

Upon consideration of defendants' motion to dismiss or in the alternative, for summary judgment, plaintiff's opposition, the memoranda submitted by the parties, and the entire record, it is by the court this 21st day of March, 1983

ORDERED that defendant's motion is granted in part and denied in part; and it is further

ORDERED that the First, Third, Fourth and Fifth Causes of Action contained in plaintiff's complaint are dismissed.

/s/ signature

United States District Judge

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 5

Criminal actions — Provisions concerning — Due process of law and just compensation clauses.

No person shall be held to answer for a capital. or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval force, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CROSS REFERENCES

Constitutional right to be informed of nature and cause of accusation, generally, USCS Constitution, Amendment 6.
Prohibition against state's denial of due process or equal protection, USCS Constitution, Amendment 14,
Grand jury procedure, generally, USCS Rules of Criminal Procedure, Rule 6.

Procedure is to indictment and information, generally, USCS Rules of Criminal Procedure, Rule 7.

RESEARCH GUIDE

Federal Procedure L Ed:

Access to District Courts, Fed Proc, L Ed § 1:466

Administrative Procedure, Fed Proc, L Ed §§2:27, 2:60, 2:121, 2:143.

Appeal, Certiorari, and Review, Fed Proc, L Ed §§ 5:109, 5:403.

Arbitration, Fed Proc, L Ed § 8:2.

Armed Forces, Civil disturbances, and National Defense, Fed Proc, L Ed §§ 9:369; 10:64.

5 U.S.C.

§ 7501. Definitions

For the purpose of this subchapter—

(1) "employee" means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and

(2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

Added Pub.L. 95—454, Title II, § 204(a), Oct. 13, 1978, 92 Stat. 1134.

§ 7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other patteren of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to—

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer:

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

Added Pub.L. 95—454, Title II, § 204(a), Oct. 13, 1978, 92 Stat. 1135.

PART I
SECTION 13. DISCIPLINARY MATTERS

13-1
INTRODUCTION

(1) As the Government's primary investigative service with a wide range of jurisdictional responsibilities for which we are accountable to the public, it is imperative that a policy of tight discipline be applied in the FBI. It is the responsibility of Bureau supervisory personnel to make clear to employees under their supervision that the Bureau's disciplinary program is firm but fair.

(2) It is imperative that any information pertaining to allegations of misconduct or improper performance of duty coming to the attention of any Bureau employee be promptly and fully reported to FBIHQ, and it is continuing responsibility of Bureau officials to see to it that the employees under their supervision are properly indoctrinated regarding this requirement so that they not only will fully understand it but will comply with it.

(3) See Part I, Section 1, of this manual regarding Activities and Standards of Conduct of employees. See Part I, Section 9, of this manual regarding annual leave for employees involved in disciplinary action.

13-2
NOTIFICATION OF FBIHQ UPON RECEIPT OF ALLEGATIONS OF MISCONDUCT OR IMPROPER PERFORMANCE OF DUTY

(1) [All allegations of employees misconduct must be reported to the Administrative Summary Unit (ASU), Administrative Services Division (ASD). Allegations of criminality or serious misconduct must be reported simultaneously to the FBI Office of Professional Responsibility (OPR), Inspection Division. OPR supervises and/or investigates all allegations of criminality or serious misconduct on the part of FBI employees.] Judicial criticism of an Agent's conduct in findings of fact, opinions, or

court orders, whether oral and written, is to be considered an allegation of serious misconduct and reported to OPR as set forth below.

(2) [When an allegation is received concerning criminality or serious misconduct, the appropriate Assistant Director, SAC or Legal Attache will advise OPR of the allegation by telephone or teletype. OPR will in turn, advise ASU/ASD. A confirming airtel, with a copy designated for the ASU/ASD, should be directed, in a sealed envelope, to FBIHQ, Attention: OPR/Inspection Division.] OPR will then determine and advise who will conduct the investigation. In most instances, the Assistant Director, SACs, or Legal Attaches will personally supervise and promptly investigate the vast majority of these matters. OPR normally investigates only those allegations involving FBIHQ officials, SACs, ASACs, and Legal Attaches and sometimes Headquarters and field supervisors or when circumstances dictate.

(3) If an allegation of misconduct within the responsibility of OPR arises out of a substantive case (pending or closed), the responsible FBIHQ Division will more than likely, continue to supervise that invetigation including the new allegation. However, FBIHQ Divisions will immediately inform [OPR/Inspection Division] of the alleged improprieties and forward that portion of the investigation to [OPR/Inspection Division] for further processing. When possible, these allegations should be carried under a personnel matter caption and handled as a separate "62" administrative matter so that the substantive investigation and/or prosecution is not hindered.

(4) Other infractions, such as lost badges or minor personal misconduct will continue to be handled by Administrative Servics Division. These matters are well defined and should continue to be handled as in the past. Any question as to whether a matter is or is not within the responsibility of OPR must be referred to OPR for a determination in this regard.

PART I
SECTION 13. DISCIPLINARY MATTERS

13-3
INVESTIGATION

(1) When investigation necessary to develop complete essential facts regarding any allegation against Bureau employees be instituted promptly, and every logical lead which will establish the true facts should be completely run out unless such action might prejudice pending investigations or prosecutions in which event FBIHQ will weight the facts, along with the recommendation of the division head.

(2) The record of the inquiry shall include the initial allegation; the investigative results; aggravating or mitigating circumstances; statement of specific charge(s); and the employee's answer(s) including defenses to the specific charge(s), if any.

13-4
INTERVIEWS OF EMPLOYEES INVOLVED

(1) Interviews of employees involved in allegations of criminality or serious misconduct should be conducted at the earliest logical time and in a forthright manner. There should be no evasiveness on the part of the Bureau official conducting the interview.

(2) The employee should be fully and specifically advised of the allegations which have been made against him/her in order that he/she may have an opportunity to fully answer and respond to them. The employee must be entirely frank and cooperative in answering inquiries of an administrative nature. If allegations are possibly criminal in nature, the employee has the right to seek counsel in the same vein as any other individual (see Section 13-6).

(3) Such interviews must be complete and thorough with all pertinent information obtained and recorded so that all phases of the allegations may be resolved. The interviews must not be unduly protracted and should be held to a reasonable length by

proper preparation and recognition of the purpose of the interviews.

(4) The inquire shall not be complete until the specific allegations that may justify disciplinary action are made known to the employee who may be disciplined and the employee is afforded reasonable time to answer the specific allegations. The employee's answers, explanations, defenses, etc., should be recorded in the form of a signed, sworn statement which should specifically include the allegations made against the employee in an introductory paragraph. Should there be any question on the part of the interviewing official as to whether a particular allegation (set of facts) might justify disciplinary action, he/she should contact OPR, Inspection Division, in order to resolve this prior to the interview so the employee will be ensured of an opportunity to appropriately respond.

13-4.1
Polygraph examinations of Bureau Employees

(1) All polygraph examinations of FBI employees and those who have made allegations against FBI employees must be approved by the Assistant Director, Inspection Division, or another person designated by the Director.

(2) Polygraph examinations of employees will be administrated away from their own office of assignment. This procedure will help protect the confidentiality of the investigation/inquiry and lessen the outside pressure on the employee which could be associated with an examination conducted with knowledge of an employee's friends and associates.

(3) Polygraph examinations of Bureau employees are to be administered by an FBIHQ examiner. In the event an FBIHQ examiner is not available, the examination will be conducted by an examiner designated by FBIHQ

See MIOG, Part II, 13-22.13.1, .2, .3, and 13-22.14 for additional instructions and information regarding polygraph examinations of employees who are subject of a criminal investigation or administrative inquiry.

13-5
SIGNED SWORN STATEMENTS

Whenever there are circumstances in connection with investigations or inquiries indicating misconduct of personnel, harassment or intimidation of subjects, other individuals or groups, or derelictions of any kind by the Bureau, all Agents engaged in such investigations or inquiries must:

(1) Immediately prepare signed sworn statements of fact so that a clear record will be available should a question arise at a later date. These statements should:

(a) Cover facts bearing directly upon charges made.

(b) Be specific as to each allegation, if allegations are specific.

(c) Be general in nature, if allegations are general in general nature.

In matters relating to a pending investigation, no interviews should be conducted until it is determined by the USA's office, the Department of Justice and/or FBI Headquarters, that such action will not hinder the investigation and/or prosecution. The SAC or any Special Agent designated by SAC may administer the oath in these statements since, under existing regulations, Agents are authorized to administer oaths in cases involving irregularities or misconduct in office of a Government employee. This statement is comparable to an affidavit, but does not necessitate notarization.

(2) Forward the original and one copy of these statements to FBIHQ under the appropriate case caption and retain copy in the field office or Headquarters file. If the allegations relate to a matter currently being investigated, prosecuted or on appeal, the USA's office (or in aggravated instances, Office of Professional Responsibility-Department of Justice) should be made aware and an opinion sought as to whether or not immediate preparation of the employee's statement would have a detrimental effect on the substantive investigation. Thereafter, if appropriate, a signed copy of any statement obtained can also be

furnished to the appropriate USA so that the court record will clearly show the true facts and any false allegations made will not stand undisputed in the court record.

(3) If the matter, whether criminal or administrative in nature is considered sufficiently serious, an attempt should be made to obtain the complainant's allegation in the form of an affidavit or sworn signed statement also.

ADMINISTRATIVE OR CRIMINAL PROCEEDINGS

(1) Prior to the interview of an employee against whom allegations of criminal misconduct have been leveled, a decision should be made as to whether the goal of the interview is to obtain a statement admissible in subsequent criminal proceedings or whether the goal is to compel the employee to make a full statement of the facts in order to ascertain what administrative action, if any, is appropriate. If an admissible statement is sought, the employee should be fully apprised that the investigation is considered to be criminal in nature. Even though the interview may be noncustodial, Miranda warnings will, in most instances, still be given. Should employees believe that their answers to the questions might constitute an admission of criminal conduct on their part, they can decline to answer the questions and be assured no admnistrative action will be taken against them for exercising this right. However, any information furnished during this interview may, at a future date, be used in administrative proceedings. If, on the other hand, the employee is initially informed that the inquiry is administrative in nature, the employee must be advised that (1) neither the statement given nor its fruits will be used in a criminal proceeding, and (2) administrative action up to and including dismissal. If, under such circumstances, the employee refuses to answer pertinent questions, he/she may be disciplined or discharged for insubordination in and of itself. Any assurances given or information furnished to the employee in line with this paragraph should be specifically included in the introductory paragraphs of the signed, sworn statement taken.

(2) In situations involving allegations of violation of Federal

statutes within the Bureau's investigative jurisdiction, before we proceed with an interview without *Miranda* rights and with assurance to the employee that any statment will not be used in criminal proceedings, FBIHQ will advise the Department of our intentions. Otherwise, the Bureau could be criticized for failure to obtain a statement which is admissible in court. OPR-Inspection Division should be consulted prior to such an interview without Miranda rights so it may in turn discuss the matter with OPR-Department of Justice (DOJ) for initial counsel whether to proceed administratively (without advice of rights) or criminally (with advice of rights). OPR-Inspection Division will advise the interviewing official of OPR-DOJ's initial opinion and will confirm it in writing. A final prosecutive opinion will be obtained from OPR-DOJ by OPR-Inspection Division at the conclusion of the inquiry and prior to furnishing the investigative results to ASU/ASD.

REPORTING

(1) In most instances, after FBIHQ has been initially notified of the allegation, it will be satisfactory for the responsible official to report the facts pertaining to the misconduct or improper performance of duty, by letter setting forth a concise statement of the situation together with supporting documentation and statements. In all cases, whether or not it is felt administrative action is, or is not recommended must be made. There can be no deviation from this procedure.

(2) To prevent unauthorized disclosure of these allegations and the subsequent inquiry, a separate field office file, when possible, should be opened and indexed under a "62" classification (Administrative Inquiry) for each investigation and be maintained in the SAC's safe. This file number will be included on all communications between field divisions and FBIHQ; communication being directed to the personal attention of the SAC and/or enclosed in a sealed envelope to FBIHQ, Attention: OPR-Inspection Division.

(3) Copies of the allegations and subsequent investigation should not be placed in the accused's field office or Headquarters

personnel files. Only if some form of administrative action is taken, will there be any need to address the allegation in one's personnel file. This is satisfactorily handled by a designated copy of the approved justification memorandum and/or addendum(s) being placed in the personnel file at FBI Headquarters as well as copies of the outgoing communication to the employee being placed in both the field office and Headquarters personnel files.

13-7.1 **Format**

Certain factual situations may require the letters in which they are reported to exceed one page in length. In these instances, such letters should conform to the following format:

(1) Title—This should, when possible, relate only to the substance of the allegation regardless whether or not it originated out of a substantive investigation or is work related. The title should include the employee(s) name, general allegation (i.e., alleged professional misconduct, etc.) complainant, if appropriate, division and Personnel Matter.

(2) Synopsis—Here should be stated briefly but clearly the pertinent facts relating to the situation. While brief, the snyopsis should contain sufficient facts to give any reviewing official a clear picture of each allegation and whether they are true or false.

ALLEGATIONS MADE BY INDIVIDUALS OUTSIDE THE BUREAU

(1) In instances in which alelgations are made by persons outside the Bureau against Bureau personnel or the Bureau itself and such charges are disproven, prompt action should be taken to refute such claims both with the source of the erroneous complaints and others having knowledge of the allegations, including news media carrying stories on the matter. Where possible every effort should be made to have the refutation appear in the same article with the charges. Whenever the advisability of taking this action appears questionable, FBIHQ should be advised and a recommendaiton made on this point setting out clearly the reasons on which the conclusion is based.

(2) If allegations are made against Bureau personnel by subjects of Bureau cases during a court trial, it is the responsibility of the SAC with the concurrence of the USA and/or DOJ, to see that proper refutation is made and that such refutation appears in court records in accordance with the Manual of Investigative Operations and Guidelines, Part II, Section 6. The purpose of this is to insure that in case of an appeal the Bureau's refutation is in the court's record. FBIHQ is to be advised promptly of all pertinent facts and circumstances relating to such allegations and refutations.

13-9 SUSPENSION WITHOUT PAY

(1) No Bureau employees are to be suspended without pay without prior FBIHQ approval. Where the seriousness of the situation warrants, the Assistant Director of the Adminsitrative Services Division may be contacted telephonically. His instructions regarding suspension without pay or other immediate action to be taken pending a final determination of the matter may be secured.

(2) In cases involving disciplinary suspension without pay for seven or more consecutive calendar days, SF-8 will be sent to the employee by Personnel Section, FIBHQ, as an enclosure with the letter addressed to employee containing suspension notification. However, when telephonic or teletype instructions are issued by FBIHQ suspending the employee for seven or more consecutive days, instructions will be issued and recorded that SF-8 be furnished. When SACs and division heads receive these instructions, a dated notation that form was sent should be made in the remarks column on the time and attendance card.

(3) Employees who are under suspension without pay cannot legally be permitted to work during the period of suspension. If employees offer to work while under suspension, they should be informed it is illegal. FBIHQ decision in such instances is unnecessary, although FBIHQ should be informed of the employee's attitude in making the offer.

13-10 VETERAN'S PREFERENCE ACT

(1) When an employee is a veteran and has completed the one-year probationary period in the Bureau, the employee is entitled under the Veterans' Preference Act to receive 30 days' advance written notice of proposed involuntary separation, involuntary reduction in grade or [pay,] or suspension without pay exceeding [14] days. The notice must state the reasons and the veteran must be given an opportunity to answer. During the period of advance written notice, the employee may be retained on active duty, be placed on annual leave or leave without pay with employee's consent, or be suspended without pay (such suspension cannot exceed 30 days in length). In any case in which there is reasonable cause to believe the employee guilty of a crime punishable by imprisonment, the advance written notice may be reduced to whatever length of time is reasonable but not less than seven days.

(2) If on active duty status, the employee must be given a reasonable amount of time to prepare an answer. The material on which the Bureau relies in proposing the adverse action must be made available to the veteran for review in connection with preparation of an answer.

(3) Upon receiving the employee's answer to the notice of proposed disciplinary action, FBIHQ will consider it and advise the employee in writing of its final decision. If this decision is adverse to employee, the employee has a right to appeal it to the appropriate regional office of the Merit Systems Protection Board. This right lasts for 15 calendar days after the effective date of the disciplinary action.

(4) Any necessary notices to employees required by the Veterans' Preference Act will be handled by FBIHQ.

13-11 RESIGNATION TENDERED DURING PERSONNEL ACTION INQUIRY

(1) It may be that an employee would rather submit his/her resignation than see the inquiry continue and face possible charges. Division heads, SACs and other supervisory employees may, upon conclusion of their findings, discuss with the

employee what the intended recommendation to FBIHQ will be with respect to administrative action, being careful to point out at the same time than any formal action or charges will be made at FBIHQ. Accordingly, it is permissible to discuss the possibility of resignation with the employee. Duress, deception, intimidation or anything similar will not be tolerated and must not be used to influence employee's decision nor may employee be denied adequate time, if requested, to make a decision between resigning or seeing the inquiry continued.

(2) Should an employee involved in allegations submit his or her resignation from the Bureau's service, such resignation should be received and forwarded to FBIHQ.

13-12 SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES FOR FBI EMPLOYEES

(1) This schedule is to be used only as a guide in determining appropriate discipline based on the violation of regulations by Bureau employees. This schedule is not all inclusive, and final determination of the appropriate disciplinary action warranted in each case will be made by FBIHQ. It should be noted that the decision-making process utilized in determining appropriate action in disciplinary matters is extensive in nature and involves input from every level of managment in FBIHQ. In addition, consdieration is given to Bureau policy and similar incidents previously resolved, as well as any aggravating or mitigating circumstances of the case in point. In some instances, discussions are held with the Department of Justice and the Office of Personnel Management before a final determination is made. In most instances, penalties for violations of regulations will fall within the range of penalties set forth in this schedule. In aggravated case, a penalty outside the range of penalties may be imposed. For example, supervisors and Bureau officials, because of their responsibility to demonstrate exemplary behavior, may be subject to a greater penalty than is provided in the range of penalties. The purpose of this schedule is not to remove the personnel management decisions made in all disciplinary matters but rather to provide an example and guide which is used at

FBIHQ in connection with decisions made in regard to disciplinary matters.

(2) In regard to suspensions, it is noted that the Civil Service Reform Act (CSRA) of 1978 provides that days of suspension will be computed in terms of calendar days, not days worked. Therefore, recommendations for a suspension will always commence at the close of business, Friday of any given week. For example, recommendation of seven (7) days' suspension, if approved, will result in a forfeiture of five days' pay whereas a recommendation of fourteen (14) days' suspension will result in a forfeiture of ten days' pay. A period of suspension in excess of 14 calendar days is an adverse action as defined in the CSRA of 1978 (see paragraph 13-10 of this section for details).

(3) For the purpose of definition, an "adverse action" is where an employee is reduced in grade or pay, suspended for more than [14] days or dismissed. All employees may appeal disciplinary action to the Director of the FBI. Thereafter, nonveteran employees in the FBI, an excepted service, do not have a right of appeal of a disciplinary action to the Merit Systems Protection Board. However, they may file an action in court. In conformance with the provisions of the Veterans' Preference Act of 1944, a veteran, following final action on an appeal to the Director of the FBI, may appeal an adverse action to the Merit Systems Protection Board and, thereafter, may file an action in court.

(4) The following definitions are furnished for information. This schedule does not include discipline required by law or infractions which, in addition to being a violation of Bureau rules and regulations, are also a criminal offense:

(a) Oral reprimand—Employees are advised of deficiency or infraction of regulations and notation made in personnel file relating to the need for the official reprimand.

(b) Commented upon in annual performance rating—In this instance, the infraction warranted more than an oral reprimand but is not considered severe enough for official recognition in the form of a letter of censure. This refers to work-related matters only.

(c) Censure—Official written reprimand.

(d) Censure and probation—Official written reprimand which include a minimum probationary period of 90 days for Special Agents and 60 days for other employees.

(e) Censure, probation and suspension —Official written reprimand which, in addition to a probationary period, includes a period of time in which the employee is removed from duty without pay.

(f) Demotion—Any reduction in grade or pay.

(g) Removal—Dropped from the rolls of the FBI.

(5) The standards by which all employees are held are set forth in this manual. For further reference, these standards of conduct can be found in the Department of Justice Order 350-65 captioned "Standards of Conduct."

[(6) An employee may be censured when the cause for administrative action is sufficiently aggravated as to require a written reprimand. At the time FBIHQ makes a promotional decision, all relevant information including the cause for a letter of censure is considered. FBIHQ expects the employee's superior to provide a strong favorable recommnedation when the employee has been the subject of disciplinary action within the preceding 12 months. Lacking such a recommendation, the Bureau may determine that a promotion from one GS or Wage level to another should be delayed for a period of up to 60 days for support employees or up to 90 days for Agents.

SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES FOR FBI EMPLOYEES

NATURE OF OFFENSE	REMARKS	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
1. Unexcused or unauthorized absence of 8 hours or less	All Personnel	Oral reprimand to 3-day suspension	Oral reprimand to 5-day suspension	Oral reprimand to removal
2. Excessive unauthorized absence (in excess of 8 hours)	All Personnel	Oral reprimand to 5-day suspension	Oral reprimand to 15-day suspension	Oral reprimand to removal
3. Work deficiencies and/or inattention to duty.	Agent Personnel	Oral reprimand to removal	5-day suspension to removal	15-day suspension to removal
	*Non-Agent Personnel	Oral reprimand to removal	3-day suspension to removal	5-day suspension to removal
4. Insubordination	All Personnel	Censure to removal	5-day suspension to removal	15-day suspension to removal
5. Unauthorized possession of, use of, loss of or damage to Government property other than motor vehicle or aircraft.	**All Personnel	Oral reprimand to removal	3-day suspension to removal	5-day suspension to removal
6. ***Unauthorized possession of, use of, loss of or damage to Government-owned or leased motor vehicle or aircraft	All Personnel	Oral reprimand to removal	3-day suspension to removal	5-day suspension to removal

7. Traffic violations [a. Aggravated (alltypes) b. Driving While Intoxicated	All Personnel	Oral reprimand to removal Oral reprimand to removal	Oral reprimand to removal 5-day suspension to removal	Oral reprimand to removal 15-day suspension to removal
8. Illegal use of Controlled Substance (Drugs and marijuana)	All Personnel	Removal		
9. Criminal, dishonest, immoral, infamous or notoriously disgraceful conduct.	All Personnel	Oral reprimand to removal	5-day suspension to removal	30-day suspension to removal
10. Failure to honor confirmed financial obligations.	All Personnel	Oral reprimand	Oral reprimand	Oral reprimand to removal
11. Unauthorized disclosure of information from Bureau records.	All personnel	Oral reprimand to removal	Removal	
12. Falsification of official documents and/or records	All Personnel	Oral reprimand to removal	Removal	
13. Availability	All Personnel	Oral reprimand to removal	Oral reprimand to removal	Oral reprimand to removal
14. Fitness for duty (overweight)	Agent Personnel	Oral reprimand	Oral reprimand to 5-day suspension	Oral reprimand to 15-day suspension

*Excluding Fingerprint Examiners, Technical Section, Identification Division, for whom standards of production and accuracy, as well as minimum penalties, have been established.

**Non-Agent Personnel-First loss of Bureau Identificaiton-no administrative action.

***Title 31, U.S. Code, Section 638a(c)(2), provides a minimum of 30 days suspension for employee who willfully uses or authorizes the use of any Government-owned or leased motor vehicle or aircraft for other than official purposes.

[13-3] DISCIPLINARY PROBATION

Disciplinary probation is a corrective and/or punitive procedure (Which may be imposed with censure and/or suspension when so dictated by the factual situation) to closely monitor an employee's performance with intent to provide counsel and correction during a specified period of time. During the disciplinary probation period, a denial of certain employee benefits may be imposed.

13-13.1 Purpose of Disciplinary Probation

To provide the employee with notice that the particular area of inefficiency, delinquiency, or poor judgment, etc., will be afforded close scrutiny for a specified period of time. During the period of disciplinary probation, the employee is expected to make a concerted effort to improve in the deficient area.

13-13.2 Length of Disciplinary Probation

The length of the disciplinary probation period is flexible and will be determined by the Director or his delegated representative. In most cases the original disciplinary probation period will be 90 days for Special Agents and 60 days for support employees. Removal from probation must be approved by the official who placed the employee on probation or by a higher Bureau authority.

13-13.3 Effects of Disciplinary Probation on Employee

During the period of disciplinary probation an employee:

(1) Will not be promoted from one GS or Wage Board level to another;

(2) Will not be considered for advancement within the Career Development Programs of the Bureau;

(3) Will not be considered for an Office of Preference Transfer;

(4) May have a promotion delayed for a period of time not to exceed the period of disciplinary probation if the action occurred during the preceding 12 months and has not been offset by a strong favorable recommendation for promotion from the employees superior. The final determination will be made by the Personnel Officer at FBIHQ.

13-13.4 Application of Disciplinary Probation

An employee will be placed on disciplinary probation only when the cause for administrative action is work performance related or work-related.

(1) Work performance considered the technical competence aspect of an employee.

(2) Work-related action involves judgement, common sense, and the impact the cause has on the public's perception of the FBI.]

Civil Action No. _____
Complaint

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL C. MURRAY
6400 Hanover Avenue
Springfield, VA 22150

Plaintiff,

v.

Theodore M. Gardner
1900 Half Street S.W.
Federal Bureau of Investigation
Washington, D.C. 20407

Oliver B. Revell
1900 Half Street, S.W.
Federal Bureau of Investigation
Washington, D.C. 20407

Barry Laken
1900 Half Street, S.W.
Federal Bureau of Investigation
Washington, D.C. 20407

James W. Vatter
1900 Half Street, S.W.
Federal Bureau of Investigation
Washington, D.C. 20407

John Schreiber
10th and Pennsylvania Avenue, N.W.
Federal Bureau of Investigation
Washington, D.C. 20535

Ivan Ford
10th and Pennsylvania Avenue, N.W.
Federal Bureau of Investigation
Washington, D.C. 20535

Defendants.

COMPLAINT FOR VIOLATION OF DUE PROCESS AND FIRST AMENDMENT RIGHTS, FOR DEFAMATION, INFLICTION OF EMOTIONAL DISTRESS, CIVIL CONSPIRACY AND FOR INJUNCTIVE RELIEF

JURISDICTION

1. Jurisdiction in this matter is founded upon the existence of a Federal question and upon pendent jurisdiction. This action arises under the Constitution of the United States, Amendments I and V. The pendent claims arise out of the same facts which give rise to the Constitutional claims. Venue in this action is in the District of Columbia.

THE PARTIES

2. The Plaintiff, Paul Murray, was and is for all periods relevant to this complaint, a special agent for the Federal Bureau of Investigation (FBI) assigned to the Washington Field Office (WFO), and makes the allegations in this complaint on knowledge, information and belief.

3. The Defendant, Theodore Gardner, was and is, for all periods relevant to this complaint, the Special Agent in Charge (SAC) of the Washington Field Office (WFO) of the Federal Bureau of Investigation.

4. The Defendant, Oliver Revell, was and is for all periods relevant to this complaint, an Assistant Director of the Federal Bureau of Investigation at FBI Headquarters in Washington, D.C.

5. The Defendant, Barry Laken, was and is, for all periods relevant to this complaint, principal legal advisor for the FBI, WFO.

6. The Defendant, John Schreiber, was for the majority of the period relevant to this complaint, Assistant Special Agent in Charge (ASAC) of the Administrative Division, of the WFO of the FBI.

7. The Defendant, James Vatter, was and is, for all periods relevant to this complaint, ASAC of the Criminal Division of the WFO of the FBI.

8. The Defendant, Ivan Ford, was and is for all periods relevant to this complaint, an agent assigned to the Office of Professional Responsibility in the FBI.

9. All of the Defendants are and were, for all periods relevant to this complaint, in positions of authority in relation to the Plaintiff.

FACTS

10. In a letter dated March 11, 1982, the Plaintiff, Paul Murray, was informed by the Defendant Revell that Murray was to be suspended from work without pay for a period of fourteen (14) days and was to be placed on six (6) months probation. The Plaintiff did in fact lose two weeks work and salary. As of the filing of this complaint he is still on the six month probation.

11. This action by the Defendant Revell was the result of a violation, by all of the Defendants in this action, of Paul Murray's First Amendment freedom of speech rights, and his Fifth Amendment right to due process, as further detailed in paragraphs below.

12. On November 23, 1981, the Plaintiff Murray was notified by his supervisor (Thomas Renaghan, not a party to this suit) that the Attorney General had ordered a furlough of about one-third of the agents in the Federal Bureau of Investigation (FBI) Washington Field Office (WFO). The WFO management had decided to meet this one-third furlough requirement by creating a lottery pool. Individuals who were in the pool would be furloughed if the individuals' name were drawn out of a hat which contained the names of all people in the lottery pool. Management personnel and their secretaries were not a part of the pool. No considerations of seniority, veteran status, or performance appraisals were used in determining who would be part of the pool. The WFO was the only FBI office to use their furlough method. Renaghan informed Murray that his name had been pulled out of the hat and that he was to be placed on furlough. He also informed Murray that the President had signed an interim bill that would prevent furloughs until the 15th of December.

13. After the conversation with Renaghan, Paul Murray called the Defendant Barry Laken, who is the WFO Principal Legal Advisor (PLA). During this conversation about the "lottery method" of determining which employees to furlough, the Defendant Laken asked Murray what he planned to do. Murray responded that if it appeared that he would be furloughed on December 15th he would be forced into legal response since the furlough system seemed capricious. Murray informed Laken that he (Murray) and Murray's former wife were contesting

custody of their children and that his being unemployed would certainly adversely affect his custody case.

14. On November 24, 1981, the Plaintiff Murray asked both Defendants Gardner and Schreiber if he could speak with them privately regarding the lottery system. Both Defendants stated that he would have his opportunity to speak at an "all employees conference" which was to be held on November 25, 1981. Their refusal to speak to the Plaintiff continued even after he informed them that his feelings were strong enough to merit a private conversation.

15. Later that day the Plaintiff was approached by the Defendant Laken. Laken explained to Murray how a furlough system could result in the furloughing of an individual with a lengthy service record while a person with lesser time on the job might retain his position. These and other statements of the Defendant Laken were intended to give an impression that opposition to the furlough plan could be detrimental to a person's career status.

16. On November 25, 1981, at the all employees conference, Defendant Gardner explained the furlough lottery and opened the floor to questions and comments. When the Plaintiff Murray took the floor to give his observations, he stated that the furlough lottery was arbitrary and capricious, and that consideration of factors such as veterans status and length of time on the job would have provided a more reasonable standard. He stated that the Bureau had "dropped the ball" by failing to plan ahead and have a furlough plan. He also stated that he found it appalling that the best method the FBI could develop regarding furlough was to throw the careers and lives of their employees, and their employees' families into a hat. Murray also stated that he objected to efforts that were made to keep him silent in regards to his views. The Defendant Gardner asked Murray how he felt that he had been coerced into silence. Murray responded by stating that he had been approached by Principal Legal Advisor Laken who informed him how an individual with Murray's tenure could be replaced based on sub-standard job performance. Gardner then ordered Murray to report to the Defendant ASAC Schreiber's office after the conference.

17. At the meeting with Gardner and Schreiber following the

all employees meeting, most of the meeting time was spent in discussions of the lottery furlough system. Gardner again attempted to justify the random lottery system of furlough, and Murray continued to oppose it. Gardner reacted angrily to this opposition. Gardner asked Murray what he intended to do about the furlough, and Murray responded that he would have to seek and injunction if it appeared that he would be laid off on December 15th.

18. At the end of the meeting, Gardner informed Murray that Murray would have to make formal charges against the Defendant Laken. Gardner stated that he had talked to Laken and it appeared that Murray had misinterpreted what Laken had said. Murray suggested that the whole matter involving Laken would probably be resolved if Laken and Murray could meet with Gardner. Gardner stated that he still needed a memo to start an official investigation into charges that Laken coerced Murray. Murray and Gardner agreed that the memo could be submitted by close of business of November 30, 1981. He stated that Murray could rough draft the memo or that a secretary could type it.

19. At close of business on November 30, 1981 Murray handed a rough draft to Terri Honeywell. Earlier in the day, she had asked him if he wanted to dictate the memo to her or to rough draft it.

20. The following day, Murray was given a memorandum from the Defendant Schreiber which accused the Plaintiff of uncceptable, unprofessional and insubordinate conduct because the memo allegedly did not contain Murray's name, allegations of coercion, nor statements regarding the arbitrary and capricious nature of the furlough decisions of the Defendants Gardner and Schreiber. Schreiber wrote that it was an extremely serious allegation for Murray to have stated during the all employee conference that the furlough lottery was abritrary and capricious.

21. The obvious reason for the Schreiber letter dated December 1, 1981, was to turn the tables on the Plaintiff, since, supposedly *solely* based on his turning in a rough draft of a memorandum, his conduct had become "unacceptable, unprofessional and bordering on insubordination." Schreiber verbally advised Murray that he was the subject of an

administrative inquiry. That the focus of the inquiry did turn away from the allegation of coercion and become an attempt to smear Paul Murray is shown by the lack of a final investigative report regarding the coercion incident, whereas an extensive file was developed over Murray's alleged insubordination.

22. In compliance with the Schreiber letter of 12/1/81, Paul Murray wrote a detailed letter concerning the allegations of coercion and the abritrary and capricious nature of the proposed furlough Murray retrieved his "unacceptable" rough draft from Schreiber. He was not asked to return the rough which he had recovered to aid him in reworking his memorandum, but that evening after he had turned in his final memorandum, Schreiber accused him of insubordination for not returning the rough draft.

23. On December 2, 1981, Murray was approached by the Defendant Vatter who again tried to convince Murray of the error of his ways in opposing the furlough lottery. Murray stood firm in his position, but wrote a memo dated December 2, 1981, in which he stated that he did not intend his comments regarding the lottery as a personal attact on the field office management.

24. On December 3, 1981 Murray was advised by his supervisor, Renaghan, that Murray was to be confined to perform work in the office rather than his normal duties. Murray was also informed by another individual that word was being spread that he was being restricted to office work because his legal efforts for custody of his children was causing him to become mentally disturbed. All squad members were made aware that Murray was being restricted to the office to provide "stability" in his life. Renaghan also told Murray that Vatter was referring Murray for discipline to the Office of Professional Responsibility within the Bureau because Murray would not cooperate. On December 11, 1981, Murray was interviewed by Ivan Ford, an FBI agent assigned to the Office of Professional Responsibility, who informed him only that they had heard that there were some problems at WFO over the lottery. Murray was asked to tell the agents all about the events surrounding the all employees conference. He was not told by the special agent that he was being investigated, although as the interview progressed, it became apparent that Murray was a target. Ford's departure

from FBI regulations and standard procedure contributed to the injuries described below.

25. On January 12, 1982 Paul Murray was involved in an investigation assignment for which he later received a letter of commendation from the SAC.

26. In a letter dated January 20, 1982, Paul Murray was notified by the Defendant Revell that consideration was being given to suspending him from duty without pay for thirty (30) days and placing him on probation. As reasons for this possible discipline, Revell stated that Murray had (1) failed to follow specific instructions regarding preparing the memorandum; (2) attempted to interfere with the course of the administrative inquiry; (3) lacked candor during the administrative inquiry; (4) was insubordinate to the Defendant Schreiber in refusing to return rough draft notes. Despite regulations requiring that notice be given of specific allegations, the Plaintiff had never been notified that he was being investigated on these matters at the time his sworn statement was taken by Ivan Ford. Further, the truth of the allegations in reason 1 are disputed even by the statements of some of the other Defendants.

27. In the letter of January 20, 1982, the Defendant Revell notified the Plaintiff of several rights: (1) review of the entire matter by an executive assistant director of the FBI; (2) the right to respond to all charges; (3) use of an attorney in all future proceedings; (4) a written decision from an executive assistant director of the FBI shortly after thirty days from the date of the January 20 letter; (5) a copy of all supporting documents used by the Bureau in pursuit of the action; (6) appeal to the Merit System Protection Board if the proposed suspension should go into effect.

28. On the day after Murray received the letter from Revell, Murray's case was openly discussed at a supervisors' conference in the WFO. At this meeting the supervisors were instructed to inform staff members that Murray's proposed punishment had noting to do with the all employees conference statements on November 25th, 1981, but had to do with the specific charges in the Revell letter. The Revell letter was then discussed among all individuals present.

29. In a letter dated January 28, 1982, the Plantiff wrote a

letter to the Defendant Revell in which he provided a detailed response to each one of the charges levelled against him in the Revell letter of January 20, backing up many of his responses with citations of the Bureau's own investigative report.

30. On February 17, 1982, Murray was given his annual performance appraisal by Supervisor Thomas Renaghan. Murray received an evaluation of "superior." In the prior two annual appraisals he had received evaluations of "excellent". In his entire career with the FBI, Murray has never received an appraisal lower than either excellent or superior.

31. Sometime in mid-February, the Defendant Vatter ordered that all work done by Murray during the previous year should be pulled and forwarded to Vatter.

32. February 19 was the expiration of the thirty day's advanced written notice of the proposed suspension. At no time since the expiration of the thirty days' advanced written notice had Murray received any communication from an executive assistant director of the FBI regarding his view of the matter, despite Revell's statement that this was a right.

33. On February 23, 1982, Vatter ordered Murray to report to his office. Murray asked his relief supervisor to ask Vatter whether the matter related to the personnel matter, since he would like to be accompanied by his attorney. If the matter did not relate to his personnel matter he would gladly report to Vatter's office. The relief supervisor returned to Murray and stated that Vatter ordered him to report to the office. In Vatter's office, Murray was told by Vatter that Vatter could call Murray into his office for any reason and the Murray had no right to bring an attorney with him.

34. During the meeting with Vatter, the personnel matters discussed in the January 20, 1982 Revell letter, in which Murray was notified of his right to an attorney during further proceedings, were directly discussed and used as the basis for modifying Murray's performance appraisal from "superior" to "minimally acceptable" in one category. In fact, the language used by the Defendant Vatter in modifying Murray's appraisal report is not even factually consistent with prior statements of Vatter and the other Defendants. Further, Vatter cities an alleged incident on January 13, 1982 in which Murray was involved in

a surveillance and made "unprofessional comments" over the Bureau radio. This is factually inaccurate since Murray was on foot, without a radio, on January 13. On the only date close to January 13 on which Murray was performing surveillance, of which Vatter would have knowledge, was on January 12. Murray received a commendation for his work that day. Murray's appraisal was not remodified by Vatter even though Murray showed Vatter evidence that he made no improper statements on FBI radio on the day alleged by Vatter.

35. On that same evening, after Murray had left for work and gone home, he was ordered to return to the Defendant Gardner's office as soon as possible. On his arrival at Gardner's office, he was handed a memo which stated that his desire to have an attorney present during his meeting with Vatter that day, during which his personnel matter was a topic, was unprofessional, intolerable, insubordinate, etc. The memo also stated that Murray had no right to legal counsel. Murray was ordered to initial the memorandum and return it to Gardner. Gardner told Murray that he was relieved of his undercover duties and was to report to the ASAC Parker (not a party to this suit) for a new assignemnt.

36. In a memo dated February 24, 1982, the Defendant Gardner memorialized his statements to the effect that Murray was being relieved of his undercover duties. Murray was then assigned the job of "look-out", a position normally fulfilled by individuals of a GS-9 grade (Murray is a GS-13).

37. On March 11, 1982, Paul Murray received a letter of that date from Oliver Revell. At no time between the date of the initial Revell letter and this one had Murray's retained attorney been contacted by the FBI regarding the charges, and all efforts by Murray to involve his attorney in such meetings with his supervisors had been rebuffed by the supervisors.

38. In the March 11, 1982 letter Revell notified Murray that he was suspended without pay for fourteen (14) days and that he was on probation for six months. In that letter Murray was told, although this was never mentioned to him previously as part of the investigation, that the situation was caused by personal problems that Murray was having with his son. The letter continued: "these problems were accentuated by your fear,

however misguided, of being furloughed and how this would affect your current attempt to gain custody of your son." The Defendant Revell obviously ignored that a furlough order had gone to effect and that Murray was told that he had been chosen for furlough. Revell also seems to indicated in the letter that the status of unemployment would have no effect on any court's decision on which parent to award custody of a child.

39. In the March 11, 1982 letter Revell also stated that Murray's counter-allegations in his January 28 letter were reviewed in depth and proven to be without substance, yet Revell offered not one shred of evidence that demonstrates that the counter-allegations are without substance. Revell does not even attempt to rebutt or explain sworn statements by FBI agents which Murray cited on his behalf.

40. The March 11 Revell letter continues by saying that it is the FBI's duty to protect long term employees from episodic abhorrent conduct caused by an employee's personal problems. Revell then wrote that Murray was suspended without pay for fourteen days and placed on probation for six months. He also stated that Murray's personnel matter would be referred to a personnel officer who would decide whether Murray should be transferred.

41. The March 11, 1982 letter deprived Paul Murray of his right to an appeal before the Merit Systems Protection Board, since under Federal Bureau of Investigation regulations a suspension for fourteen days or less was not an adverse decision. Further, efforts by Paul Murray to obtain an appeal by the Office of the Director of the FBI were denied.

42. Toward the end of March, Murray was transferred again. When he reported to one individual's office regarding the transfer, he was told by the individual that Murray was being considered for termination, but it had been decided to transfer him. The individual stated that Murray had embarrassed the SAC (the Defendant Gardner).

CAUSES OF ACTION AND CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION-VIOLATION OF PROCEDURAL DUE PROCESS RIGHTS

43. The Plaintiff hereby realleges and incorporates into this Count all paragraphs previously alleged.

44. The acts of the defendants named in this suit deprived the Plaintiff of his liberty interest in his reputation and his property interest in his employment. Specifically, but not totally inclusively, the Plaintiff was deprived by his procedural due process rights to adequate notice of charges brought against him, his right to respond to such charges, his right to counsel, and his right to consideration of the matter by a fair factfinder, and his right to termination of the charges based on those facts. Further, Murray was deprived of any right to appeal by the manner in which the disciplinary action was administered.

45. Such acts by the Defendants were sponsored by ill will and were not formed in good faith or based on reasonable grounds.

46. As a proximate result of these intentional acts, the Plaintiff Murray has been deprived of his good reputation and has suffered great emotional distress and has been forced to incur expenses in connection herewith and has received punitive action against him and has lost opportunity for professional advancement within and without the FBI, and has lost opportunity for increased financial rewards based on merit and promotion.

WHEREFORE, the Plaintiff requests that the Court enter judgment in his favor and against each of the Defendants, jointly and severally, in the amount of $50,000.00 for compensatory damages and for lost wages, and for $100,000.00 in punitive damages and for attorney's fees and the costs of this suit.

SECOND CAUSE OF ACTION—VIOLATION OF FIRST AMENDMENT RIGHTS

47. The Plaintiff hereby realleges and incorporates into this Count all paragraphs previously alleged.

48. The actions by all of the Defendants to this suit were part of an effort to deprive the Plaintiff of his Constitutional Right to

Freedom of Speech under the First Amendment; both to penalize him for previous lawful expression, and to deter him from making future lawful expression.

49. As a proximate result of these intentional acts, the Plaintiff Murray has been deprived of his good reputation and has suffered great emotional distress and has been forced to incure expenses in connection herewith and has received punitive action against him and his lost opportunity for professional advancement within and without the FBI, and has lost opportunities for increased financial rewards based on merit and promotion.

WHEREFORE, the Plaintiff requests that the Court enter judgment in his favor and against each of the Defendants, jointly and severally, in the amount of $50,000.00 for compensatory damages and for $100,000.00 in punitive damages and for attorney's fee and the costs for this suit.

THIRD CAUSE OF ACTION — DEFAMATION

50. The Plaintiff hereby realleges and incorporates into this Count all paragraphs previously alleged.

51. Written and oral statements made by each of the Defendants concerning the Plaintiff Murray were made without privilege, and or were made with malice, and/or were made without a reasonable basis of fact, and were made with the intent, and/or had the effect of defaming the Plaintiff.

WHEREFORE, the Plaintiff requests that the Court enter judgment in his favor and against each of the Defendants, jointly and severally, in the amount ot $50,000 for compensatory damages and for $250,000 in punitive damages and for reasonable attorney's fees and the costs of this action.

FOURTH CAUSE OF ACTION — INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

52. The Plaintiff hereby realleges and incorporates into this Court all paragraphs previously alleged.

53. During the course of the investigation into these personnel matters and thereafter, the Defendants had knowingly and intentionally used as a weapon against Paul Murray the

psychological problems, which his son, Kevin, has been experiencing.

54. The Defendants have also used as a weapon against Paul Murray his effort to obtain custody of his children. The Defendants abused their special relationship with the Plaintiff in furtherance of their use of the weapon of the Plaintiff's family relationships and difficulities. Such conduct by the Defendants has caused great emotional and mental distress to the Plaintiff.

WHEREFORE, the Plaintiff request that the Court enter judgment in his favor and against each of the Defendants, jointly and severally, in the amount of $50,000.00 for compensatory damages and for $250,000 in punitive damages.

FIFTH CAUSE OF ACTION—
CIVIL CONSPIRACY

55. The Plaintiff hereby realleges and incorporates into this Count all paragraphs previously alleged.

56. During the course of the period relevant to his lawsuit the Defendants agred, conspired and confederated among each other to engage in the acts described above with the intention of injuring the Plaintiff.

WHEREFORE, the Plaintiff requests that the Court enter judgment in his favor and against each of the Defendants, jointly and severally, in the amount of $50,000.00 for compensatory damages and for $50,000 in punitive damages.

REQUESTS FOR INJUNCTIVE RELIEF

57. The Plaintiff hereby realleges and incorporates into this Count all paragraphs previously alleged.

58. The Plaintiff requests that the Defendants be enjoined from taking any adverse personnel action against him pendency of this suit.

59. The Plaintiff requests that the Defendants be required to clear the Plaintiff's personnel file of all adverse actions pertaining to the matters in this suit, and to correct all performance evaluations modified by the Defendants.

60. The Plaintiff requests that the Defendants be ordered to pay reasonable attorneys fees and costs of this suit.

OTHER RELIEF

61. In addition to the relief requested in the above claims for relief, the Plaintiff requests that the Court order such other and further relief as this court deems just.

JURY DEMAND

The Plaintiff, PAUL MURRAY, request a trial by jury on all issues properly triable by jury in this matter.

Respectfully submitted,
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By Counsel

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Office-Supreme Court, U.S.
FILED
FEB 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-783 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

PAUL C. MURRAY, PETITIONER

v.

THEODORE M. GARDNER, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's remarks at a meeting with his supervisors, expressing opposition to his temporary furlough and charging that a supervisor attempted to coerce him to remain silent, constituted speech on a matter of public concern such that a 14-day suspension allegedly imposed in retaliation for the remarks violated the First Amendment.

2. Whether the FBI, in imposing the suspension, denied petitioner procedural protections to which he was entitled.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 741 F.2d 434. The orders (Pet. App. A15-A16) and opinion (App., *infra,* 1a-8a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1984. The petition for a writ of certiorari was filed on November 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a special agent of the Federal Bureau of Investigation who formerly served in the Washington Field Office (WFO). Because of anticipated delays in securing funding, the WFO developed a plan in November 1981

under which about a third of the special agents in the office would be temporarily furloughed. The WFO management chose the agents to be furloughed by drawing names at random, and petitioner's name was chosen. Pet. App. A2. Petitioner voiced an objection to this plan to respondent Laken, the principal Legal Adviser of the office, and to respondent Gardner, the Special Agent in charge. Petitioner claims that Laken made several statements to him that "were intended to give an impression that opposition to the furlough plan could be detrimental to a person's career status" (*id.* at A3, A41). At a subsequent conference of all WFO employees to discuss the furloughs, petitioner stated that the lottery method for determining whom to furlough was arbitrary and capricious and that he preferred considering veteran's status and length of service. Petitioner also accused respondent Laken of trying to coerce him into silence. *Id.* at A4, A41. Respondent Gardner, deeming the coercion charge to be a serious accusation, ordered petitioner to submit a memorandum detailing the charge (*id.* at A4).

Petitioner submitted a rough draft of his charges, but his supervisors told him that the draft was "unacceptable, unprofessional and bordering on insubordination" (Pet. App. A4, A42). In response, petitioner prepared a more detailed written letter describing his allegations. To prepare this, he borrowed the rough draft but did not return it to his supervisors when he submitted the more detailed letter (*id.* at A5). Soon thereafter, petitioner's supervisors referred him to the FBI's Office of Professional Responsibility for possible discipline (*ibid.*).

On January 20, 1982, respondent Revell, an Assistant Director of the FBI, informed petitioner by letter that the FBI was considering whether to suspend him for 30 days without pay because of his failure to cooperate with the investigation of his coercion charges (Pet. App. A5, A44).

The letter stated as grounds for the proposed suspension that petitioner failed to follow instructions on the preparation of his memorandum detailing the coercion charges, that he tried to interfere with the investigation of the charges, that he lacked candor, and that he was insubordinate for not returning the rough draft (*id.* at A44). Petitioner filed a written response to this letter on January 28, 1982 (*id.* at A6). On March 11, 1982, respondent Revell informed petitioner by letter that he would be suspended without pay for 14 (rather than 30) days and that he would be on probation for six months (*ibid.*).

2. Petitioner then filed this suit in the United States District Court for the District of Columbia against respondents, six of his supervisors, seeking damages from them in their personal capacities as well as injunctive relief. Petitioner alleged a violation of his First Amendment rights, a deprivation of due process, defamation, intentional infliction of emotional distress, and conspiracy. Pet. App. A48-A50.

The district court dismissed the complaint (Pet. App. A15, A16). The court concluded that petitioner was given all the process to which he was entitled and that the defendants were immune from suit on the common law tort claims (App., *infra,* 6a). The court further ruled that because petitioner's statements did not not deal with a matter of "public concern," this Court's decision in *Connick* v. *Myers,* 461 U.S. 138 (1983), required the dismissal of petitioner's First Amendment claim alleging that he was suspended in retaliation for his speech (Pet. App. A15).[1]

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[1]The district court initially declined to dismiss the First Amendment claim, concluding that factual issues were in dispute (App., *infra,* 3a-6a), but it reconsidered its holding after this Court's decision in *Connick*.

The court of appeals affirmed (Pet. App. A1-A14), agreeing with the district court that petitioner's First Amendment claim was barred under *Connick*. The court of appeals noted that *Connick* established that expression by a public employee is not protected if it " 'cannot be fairly considered as relating to any matter of political, social, or other concern to the community' " (*id.* at A8, quoting 461 U.S. at 146). The court stated that it could "[d]iscern nothing in [petitioner's] remarks that would enrich the public's store of appropriate knowledge on the operation of the FBI or which would in any way relate to matters of general public concern. Rather, his remarks appear to be an example of the quintessential employee beef: management has acted incompetently" (Pet. App. A9). The court of appeals also agreed with the district court that petitioner received all the procedural protections to which he was entitled (*id.* at A12-A14).

ARGUMENT

1. a. Petitioner's principal contention (Pet. 6-12) is that his suspension, allegedly imposed in retaliation for the statements he made at the meeting to discuss the furlough policy, violated the First Amendment. As the courts below ruled, this claim is squarely foreclosed by *Connick*.

In *Connick*, a public employer initiated a transfer of Myers, an Assistant District Attorney, to different job duties. Myers voiced her objection to the transfer to her superiors, then circulated a questionnaire to other Assistant District Attorneys, soliciting their views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. Myers was dismissed for circulating the questionnaire. This Court ruled that, with the exception of the question about pressure to work in a political campaign,

Myers's speech did not address any "matter of public concern" (*id.* at 149) but rather was "most accurately characterized as an employee grievance concerning internal office policy" (*id.* at 154).[2] The Court, noting that common sense dictates "that government offices [can]not function if every employment decision bec[o]me[s] a constitutional matter" (*id.* at 143; footnote omitted), stated that "if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge" (*id.* at 146; footnote omitted). The Court accordingly held as follows (*id.* at 146-147):

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. * * *
>
> * * * We hold * * * that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances,

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[2]The Court analyzed separately the single question, concerning pressure to participate in political campaigns, that did address a matter of public concern. It rejected that claim as well, after striking the balance required by *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). 461 U.S. at 149-154. Petitioner's statements contain no parallel to this question.

> a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

This case is on all fours with *Connick*. Petitioner, like Myers, was a professional employee in a law enforcement office. Both felt they were treated unfairly by a management decision on allocation of personnel, one by a transfer to new duties, the other by a temporary furlough. Both expressed objections, first directly to their superiors and then more generally to other office employees. As part of their objections, both suggested that certain of their superiors were not fair or trustworthy. In all other respects, petitioner's statements, like Myers's, consisted solely of criticism of the particular personnel decision that adversely affected him. *Connick* therefore compels the conclusion that petitioner was not commenting on any matters of public concern and that the disciplinary actions taken against him did not violate the First Amendment.

Petitioner attempts to avoid *Connick* by asserting that his speech did in fact involve matters of public concern: "the appropriate use of limited public funds" (Pet. 7); "the quality of personnel to be maintained on the FBI staff" (Pet. 8); and "intimidation of Federal employees" (Pet. 9). But similar arguments could have been advanced by Myers (see 461 U.S. at 163-165 (Brennan, J., dissenting)) and could be advanced by every public employee who is disciplined for making statements that, by challenging the decision of a superior official, disrupt morale or the orderly functioning of a government office. See 461 U.S. at 148; *id.* at 149 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case."). As the court of appeals explained (Pet. App. A10),

"[i]f *Connick*'s rule could be bypassed by the arguments that [petitioner] raises — that public monies and government efficiency are involved — *Connick* would stand for nothing."[3]

Finally, petitioner contends (Pet. 11-12) that his First Amendment claim is not barred under *Connick* because he was disciplined for remarks made at a forum created by management for the purpose of airing views about the furlough plan. We note that in *Connick*, as well, there was a suggestion that the employer had invited the speech for which Myers was subsequently disciplined. See 461 U.S. at 141 (questionnaire was prepared in response to supervisor's suggestion that Myers's "concerns were not shared by others in the office"). In any event, petitioner's argument — that he should not be disciplined because "[i]mplicit in the invitation to speak is the assurance that a price or penalty will not be extracted on account of what is said" (Pet. 11) — is not a claim that his speech involved a matter of public concern or for some other reason is entitled to greater protection under the First Amendment than Myers's speech was afforded. Rather, petitioner's argument is that it was unfair for the FBI to discipline him for speech that the FBI itself had invited. But the Court clearly ruled in *Connick* that when a public employee's speech does not involve a matter of public concern, the Court will not entertain a First Amendment claim that discipline imposed in response to that speech was unfair or unreasonable. 461 U.S. at 146, quoted at page 5, *supra*.

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[3]Notably, petitioner, like Myers, alleges only that he was disciplined for speech in the workplace. It is therefore immaterial — even assuming that it is true — that the "subject matter [of petitioner's remarks] could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Connick*, 461 U.S. at 148 n.8.

b. Petitioner's claims for damages — which were brought against respondents in their personal capacities — are precluded for other reasons as well. Even if the Court were to disagree with our submission that this case is controlled by *Connick,* there can surely be no dispute that at the very least, a substantial argument can be made under *Connick* that petitioner's suspension did not violate the Constitution. Accordingly, petitioner unquestionably has not stated a violation of "clearly established * * * constitutional rights of which a reasonable person would have known" (*Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982)).[4] Respondents are therefore immune from damages liability. *Ibid.*

Moreover, Congress has provided a specific remedy for employees of the FBI who claim that they have been disciplined for "whistleblowing" — that is, for disclosing information that is reasonably believed to reveal a violation of law, "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. 2303. Congress deliberately excluded employees of the FBI from the coverage of other remedies designed to protect alleged whistleblowers. See 5 U.S.C. 2302(a)(2)(C)(ii). Although petitioner asserts that his speech involved a matter of public concern because it addressed mismanagement of personnel and the misuse of funds, he does not suggest that he is eligible to invoke, or has sought to invoke, the remedy Congress provided. In view of the careful congressional design, the marginal — at best — nature of petitioner's constitutional claim, and the fact that petitioner's claim raises an issue that "may appropriately be characterized as one of 'federal personnel policy' " (*Bush* v. *Lucas,* 462 U.S. 367, 381 (1982)), it would be

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[4] *Connick* was not a departure from previous decisions of this Court. Indeed, the Court in *Connick* relied heavily on its prior precedents. See, *e.g.,* 461 U.S. at 142, 143, 146.

"inappropriate * * * to supplement" the remedy Congress has provided with an implied damages remedy against individual officials (*id.* at 369).

2. Petitioner also claims (Pet. 13-16) that the FBI denied him certain procedural protections to which he was entitled. Petitioner contended in the courts below that he was deprived of liberty and property without due process of law, in violation of the Fifth Amendment. The courts below correctly rejected this contention for the following reasons (Pet. App. A13, quoting App., *infra*, 6a):

> [E]ven if [petitioner] does have * * * property and liberty interests [in continued employment with the FBI], he was given all the process that was due under the circumstances. Due process requirements vary according to the severity of the threatened loss. See, *e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). In [petitioner's] case, the major disciplinary action taken against him was a fourteen-day suspension without pay. Prior to that suspension he was notified of the proposed disciplinary action and given the opportunity to respond orally and in writing to accusations on which the action was based. Such notice and opportunity to be heard [were] sufficient to satisfy due process requirements under the circumstances. [5]

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[5]In addition, Congress has devised a carefully graduated scheme that requires a certain degree of process when a suspension of 14 days or less is imposed on a federal employee (see 5 U.S.C. 7502); additional procedural protections when a more severe sanction is imposed (see 5 U.S.C. 7511 *et seq.*); and further protections when an employee alleges that he has been disciplined for certain impermissible reasons (see 5 U.S.C. 2301 *et seq.*). Petitioner received the procedural protections that Congress specified, and the congressional balancing of the relevant interests (see *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976)) should be accorded great deference in determining the constitutional requirements of due process.

Petitioner now appears to contend not that the Due Process Clause of its own force required that he be afforded additional procedural protections but only that the FBI failed to comply with 5 U.S.C. 7503 and with its own letter warning petitioner that his suspension was under consideration. To be sure, petitioner asserts that the Due Process Clause requires an agency to comply with its own "regulations and orders" even when those regulations provide greater protection than the Due Process Clause itself (Pet. 13). But that assertion is incorrect; the general principle that an agency must follow its own regulations — a requirement that is by no means absolute in any event (see *United States* v. *Caceres*, 440 U.S. 741, 754 n.18 (1979)) — is at most a " 'judicially evolved rule of administrative law' " (*ibid.*, quoting *Vitarelli* v. *Seaton*, 359 U.S. 535, 547 (1959) (opinion of Frankfurter, J.)), not a constitutional requirement. Since petitioner does not assert that the Constitution was violated, he has again failed to state a claim for damages; he suggests no reason to believe that the violation of a statute — much less a failure to provide certain procedures outlined in a letter — can give rise to a damages action against federal officials in their personal capacities.

In any event, petitioner was not denied any procedural protections to which he was entitled by statute or otherwise. Petitioner correctly notes (Pet. 14, 16) that 5 U.S.C. 7503(b)(3) provides the right to "be represented by an attorney or other representative" in connection with a proposed suspension of 14 days or less. Although petitioner now asserts that this right was denied "on three occasions" (Pet. 14), the complaint identifies only one occasion, a meeting between petitioner and respondent Vatter (Pet. App. A45-A46). But the purpose of that meeting, according to petitioner's own account, was not to consider petitioner's suspension — something respondent Vatter did not have the responsibility to do — but to discuss modifying

petitioner's performance appraisal. Section 7503 does not grant an employee the right to an attorney at a meeting to discuss a performance appraisal, and nothing in Section 7503 suggests that an employee has the right to an attorney at every meeting with a superior concerning his job status whenever a suspension is under consideration by certain other superiors.

The letter of January 20, 1982, on which petitioner relies (Pet. 14), informed him that the FBI was considering suspending him for 30 days, and detailed the procedural rights he would be afforded. Petitioner asserts that he did not in fact receive some of these protections — specifically, certain internal agency review proceedings and a right to appeal to the Merit Systems Protection Board (MSPB). But the rights detailed in the letter are those that would have been granted if petitioner had been suspended for 30 days, as the letter proposed. The less severe sanction ultimately imposed on petitioner does not warrant the same protections. Compare 5 U.S.C. 7503 with 5 U.S.C. 7513(d) (an employee can appeal to the MSPB only a disciplinary sanction more severe than a 14-day suspension).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1985

DOJ-1985-02

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL C. MURRAY,	)
	)
Plaintiff,	)
	)
v.	) Civil Action No. 82-2405
	) FILED
THEODORE M. GARDNER, et al.,	)
	) MAR 21 1983
Defendants,	)
	) James F. Davey, Clerk
	)

MEMORANDUM

Paul C. Murray, an Agent in the Federal Bureau of Investigation (FBI), brings this action for damages and injunctive relief against six fellow Agents of the FBI. Murray alleges that the defendants improperly disciplined him for his comments concerning an FBI furlough plan, in violation of the First and Fifth Amendments of the United States Constitution. Murray also makes several tort claims. The action is now before the Court on defendants' motion to dismiss or, in the alternative, for summary judgment.

In November of 1981, the FBI was forced to develop a plan to furlough approximately one-third of the Agents in the Washington Field Office (WFO) due to funding delays. The WFO management decided to choose the Agents to be furloughed by drawing names from a hat containing the names of essentially all the Agents in the office. The drawing was held and Murray was notified on November 23, 1981, that his name had been drawn.

At the time of the drawing, Murray was embroiled in a battle with his ex-wife over custody of their children. Murray indicated to one of the defendants, Agent Laken, WFO Principal Legal Advisor, that his custody case would be harmed if he was furloughed and that he would oppose the furlough lottery plan. Laken allegedly told Murray that his career could be jeopardized if he spoke out against the plan.

On November 25, 1981, the WFO management held an "all employees" conference to discuss the furlough plan. Murray spoke vehemently against the plan at the conference, calling it arbitrary and capricious, and objected openly to Laken's alleged attempt to coerce him into silence. Defendant Gardner, Special Agent in Charge (SAC) of the WFO, ordered Murray to report to Defendant Schreiber, Assistant Special Agent in Charge (ASAC), following the meeting.

Gardner and Schreiber discussed his allegations with Murray and ordered him to file a written report concerning those allegations. Murray did take steps to file such a written report. In the process, however, he apparently angered ASAC Schreiber, allegedly because he did not submit the report in proper form and refused to return a "rough draft" to Schreiber. As a result, he was accused of insubordination and became himself the target of an investigation.

On December 11, 1981, Murray was interviewed by Defendant Ford, an FBI Agent assigned to the Office of Professional Responsibility. Ford asked Murray to discuss the events surrounding the "all employees" conference. Ford allegedly did not inform him that he was the Agent being investigated. Murray was notified by a letter dated January 20, 1982, from Defendant Revell, Assistant Director of the FBI, that the FBI was considering suspending him for thirty days and placing him on probation. The reasons given for the punishment were related to Murray's alleged

failure to properly present a written memorandum concerning his allegations concerning the furlough plan and for insubordination for failing to return a "rough draft" when ordered to do so by ASAC Schreiber. Revell's letter also outlined certain procedural rights accorded Murray. Murray responded to the allegations raised by Revell in a letter to Revell dated January 28, 1982.

On February 22, 1982, Murray met with Defendant Vatter, ASAC. Murray and Vatter discussed the matters relating to Murray's claims concerning the furlough plan and Vatter indicated that Murray's annual performance rating was being retroactively reduced in one area from "superior" to "minimally acceptable", and reduced overall. This was the first instance in Murray's approximately eleven-year FBI career that he had received a rating lower than "superior."

Murray received another letter from Defendant Revell on approximately March 11, 1982. This letter informed Murray that he was suspended without pay for fourteen days and placed on probation for six months. Murray served the suspension and in late March of 1983, he was transferred. The Complaint which began this action was filed on August 25, 1982.

Murray alleges five separate causes of action as grounds for relief: (1) violation of his First Amendment rights, (2) violation of his Fifth Amendment rights, (3) defamation, (4) intentional infliction of emotional distress, and (5) conspiracy. The first two of these claims are based on the United States Constitution and the remaining three are common law tort claims.

The First Amendment claim raised by Murray is based on his contention that the disciplinary actions taken by defendants were in retaliation for his statements at the "all employees" meeting. Government employees are partially

protected by the First Amendment from being fired or otherwise disciplined because of their statements. The scope of the First Amendment protection is limited by the government's legitimate interest in insuring efficiency in government operations. *See, e.g., Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977); *Pickering v. Board of Education,* 391 U.S. 563 (1968).

The validity of Murray's First Amendment claim can be determined by applying the three-step analysis established by the Supreme Court. *See id.* Initially, the Court must determine whether Murray's statements were "protected speech" under the First Amendment. *Pickering v. Board of Education,* 391 U.S. at 568-570. Murray's statements at the "all employees" conference will be protected if the balance between his interest in making such statements and the government's interest in promoting harmony and efficiency weighs in his favor. *Id.* Since Murray's comments were not directed to a matter of true public concern, his free speech interest is somewhat discounted. *See Foster v. Ripley,* 645 F.2d 1142 (D.C. Cir. 1981). The FBI, however, has failed to show beyond reasonable dispute that some actual harm resulted from Murray's statements concerning the FBI's furlough plan and Agent Laken's actions. Such a showing is required in this Circuit to overcome an employee's interest in speaking freely. *See Tygrett v. Berry,* 627 F.2d 1279, 1282 (D.C. Cir. 1980); *Waters v. Chaffin,* 684 F.2d 833, 839 n.12 (11th Cir. 1982). Under the *Pickering* test, therefore, the Court must conclude in considering this motion that Murray's statements at the "all employees" conference are entitled to First Amendment protection. *See Hanson v. Hoffman,* 628 F.2d 42 (D.C. Cir. 1980).

To recover for violation of First Amendment rights, Murray must also show that his fourteen-day suspension and other punishments were caused by his protected statements. The defendants argue that other actions by Murray

led to his suspension, such as his refusal to timely submit a written memorandum concerning his allegations and to return a "rough draft" as ordered. Murray claims that these grounds are mere pretexts. In deciding this motion to dismiss or for summary judgment, the Court must construe disputed facts in favor of Murray. *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 157 (1970). Accordingly, for the purposes of this motion, the Court must assume that defendants' disciplinary actions were substantially motivated by Murray's protected speech.

The third and final question in the *Pickering* and *Mt. Healthy* analysis is whether the defendants can show that the disciplinary measures would have been taken even if Murray had never made the protected statements. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. at 285. Again, the Court finds a genuine dispute over this issue. Disputed questions of motivation cannot be decided by the Court at this stage. *See, e.g., Hanson v. Hoffman*, 628 F.2d 42 (D.C. Cir. 1980). Murray's First Amendment claim, therefore, passes the *Pickering* test.

Defendants also claim that even if they did violate Murray's First Amendment rights, they are immune from suit concerning that violation because of the qualified immunity granted government officials. *See Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982). Immunity is only granted, however, when the acts of the officials do not violate "clearly established" constitutional rights. 102 S. Ct. at 2738. The factual scenario alleged by Murray indicates that the defendants fabricated reasons other than Murray's statements to explain their actions because they realized those statements were clearly protected by the First Amendment. There is, thus, genuine dispute over whether defendants' actions violated clearly established constitutional rights. Defendants, therefore, are not entitled to dismissal of Murray's First Amendment claim based on qualified immunity.

The preceding analysis indicates that Murray may proceed on his First Amendment cause of action. The remaining four causes of action asserted in his Complaint, however, must be dismissed.

Murray raises a claim under the Fifth Amendment, arguing that he had liberty and property interests in his continued employment without being disciplined and that his interests were harmed without due process. The Court finds that even if Murray does have such property and liberty interests, he was given all the process that was due under the circumstances. Due process requirements vary according to the severity of the threatened loss. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319 (1976). In Murray's case, the major disciplinary action taken against him was a fourteen-day suspension without pay. Prior to that suspension he was notified of the proposed disciplinary action and given the opportunity to respond orally and in writing to accusations on which the action was based. Such notice and opportunity to be heard was sufficient to satisfy due process requirements under the circumstances. *See, e.g., id., Foster v. Ripley,* 645 F.2d at 1150.

The defendants are federal officials and their actions were within the outer perimeter of their official duties. *See Briggs v. Goodwin,* 569 F.2d 10, 16 (D.C. Cir. 1977). Under the doctrine of absolute immunity, therefore, "[u]nless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss." *Butz v. Economou,* 438 U.S. at 507-508. Murray's claims of defamation, intentional infliction of emotional distress, and civil conspiracy are common law tort claims, not based on the Constitution, and must be dismissed. *See Sami v. United States,* 617 F.2d 755, 770 (D.C. Cir. (1979).

An indicated, Murray may proceed only on his First Amendment claim. Accordingly, defendants' motion to dismiss is granted as to Counts 1, 3, 4 and 5 and denied as to Count 2.

An appropriate Order follows.

/s/ John Smith, Jr.

United States District Judge

Dated: March 21, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL C. MURRAY,	)
	)
Plaintiff,	)
	)
v.	) Civil Action No. 82-2405
	) FILED
THEODORE M. GARDNER, et al.,	)
	) MAR 21 1983
Defendants,	)
	) James F. Davey, Clerk
	)

ORDER

Upon consideration of defendants' motion to dismiss or, in the alternative, for summary judgment, plaintiff's opposition, the memoranda submitted by the parties, and the entire record, it is by the Court this 21st day of March, 1983

ORDERED that defendants' motion is granted in part and denied in part; and it is further.

ORDERED that the First, Third, Fourth and Fifth Causes of Action contained in plaintiff's complaint are dismissed.

/s/ John Smith, Jr.

United States District Judge